

*United States Court of Appeals  
for the Second Circuit*



**APPELLEE'S  
APPENDIX**



76-1495

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee

v.

EUGENE SCAFIDI, BARIO MASCITTI,  
ANTHONY DI MATTEO, SAVERIO CARRARA,  
MICHAEL DELUCA, JAMES NAPOLI, JR.,  
JAMES V. NAPOLI, SR., ROBERT VOULO  
and SABATO VIGORITO,

Appellants

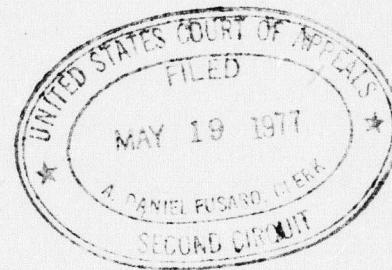
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APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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GOVERNMENT'S APPENDIX.

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DAVID G. TRAGER,  
United States Attorney,  
Eastern District of New York.

WILLIAM G. TIS,  
MICHAEL E. MOORE,  
Attorneys,  
Department of Justice,  
Washington, D.C. 20530.

FRED BARLOW,  
Special Attorney,  
Department of Justice,  
Brooklyn, New York.

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
IN THE MATTER OF THE APPLICATION FOR  
THE UNITED STATES FOR AN ORDER AUTHORIZING  
THE INTERCEPTION OF WIRE COMMUNICATIONS

ORDEP

-----X  
ORDER AUTHORIZING INTERCEPTION OF WIRE COMMUNICATIONS

TO: Special Agents of the Federal Bureau of Investigation  
United States Department of Justice

Application under oath having been made before me by  
Fred F. Barlow, Special Attorney with the Organized Crime and  
Racketeering Section of the United States Department of Justice,  
and an "investigative or law enforcement officer" as defined in  
Section 2510 (7) of Title 18, United States Code, for an Order  
authorizing the interception of oral communications pursuant to  
Section 2518 of Title 18, United States Code, and full  
consideration having been given to the matter set forth therein,  
the Court finds:

a) there is probable cause to believe that JAMES NAPOLI, Jr.,  
also known as Lefty, BARI MASCITTI, ANTHONY DI MATTEO, also known  
as Tony Apples, EUGENE SCAFIDI, also known as Bo, ROCCO RICCARDI,  
a. o known as Rocky, ROBERT VOULO, JOSEPH SIMONELLI, also known as  
Joe Black, a person answering the telephone numbered 894-9195, and  
others as yet unknown have committed and are committing offenses  
involving the conducting, financing, managing, supervising, directing,  
or owning in whole or part, a gambling business which (1) violates  
Article 225 of the New York State Revised Penal Laws, (2) involves  
five or more persons who conduct, finance, manage, supervise, direct,  
or own all or part of such business, and (3) remains in  
substantially continuous operation for a period in excess of  
thirty (30) days, or has a gross revenue of \$2,000 in any single day,  
in violation of Section 1955 of Title 18, United States Code, and  
the conspiring to commit said federal offense in violation of  
Section 371, Title 18, United States Code.

b) there is probable cause to believe that particular wire communications of BARI MASCITTI, ANTHONY DI MATTEO also known as Tony Apples, EUGENE SCAFIDI also known as Bo, ROBERT VOULO, JOSEPH SIMONELLI also known as Joe Black, a person answering the telephone numbered 894-9195, and others concerning these offenses will be obtained through the interception, authorization for which is herein applied for. In particular, these wire communications will concern the conduct, financing, management, supervision, direction and ownership of a wagering and betting business, the duration and continuity of the operation of this business, the number, degree of participation and identity of persons active thereof, the location from which the participants operate, the origin and destination of bets, and the amounts of revenue involved in such betting business.

c) normal investigative procedures reasonably appear to be unlikely to succeed, if tried further.

d) there is probable cause to believe that the telephone numbered 212-932-2708, located at Apartment 309, 8-15 27th Avenue, Astoria, Queens, New York and the telephone numbered 212-835-1163, located at 161-20 91st Street, Howard Beach, Queens, New York, have been and are being used by JAMES NAPOLI, Jr. also known as Lefty, BARI MASCITTI, ANTHONY DI MATTEO also known as Tony Apples, EUGENE SCAFIDI also known as Bo, ROCCO RICCARDI also known as Rocky, ROBERT VOULO, JOSEPH SIMONELLI also known as Joe Black, a person answering the telephone numbered 894-9195, and others as yet unknown in connection with the commission of the above-described offenses.

WHEREFORE, it is hereby ordered that:

Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized, pursuant to application by the Attorney General of the United States, the Honorable Richard C. Kleindienst under powers conferred on the Attorney General by Section 2516 of Title 18, United States Code, to intercept wire communications of BARI MASCITTI, ANTHONY DI MATTEO also known as Tony Apples, EUGENE SCAFIDI also known as Bo, ROBERT VOULO, JOSEPH SIMONELLI also known as Joe Black, a person answering the telephone numbered 894-9195, and others as yet unknown, 2

concerning the above-described offenses to and from the telephone numbered 932-2708 and located at Apartment 309, 8-15 27th Avenue, Astoria, Queens, New York, and the telephone numbered 212-835-1163, located at 161-20 71st Street, Howard Beach, Queens, New York.

Such interception shall continue until communications have been intercepted which reveal the manner in which JAMES NAPOLI, Jr. also known as Lefty, BARI MASCITTI, ANTHONY DI MATTEO, also known as Tony Apples, EUGENE SCAFIDI, also known as Bo, ROCCO RICCARDI, also known as Rocky, ROBERT VOULO, JOSEPH SIMONELLI, also known as Joe Black, a person answering the telephone numbered 894-9195, and others as yet unknown participate in this illegal gambling business, and which reveal the identities of their confederates, their places of operation and the nature of the conspiracy involved therein, or for a period of fifteen (15) days, except Sundays (the day on which the policy bank is not in operation), from the date of this Order, whichever is earlier.

PROVIDING THAT, this authorization to intercept wire communications shall be executed as soon as practicable after signing of this Order and shall be conducted in such a way as to minimize the interception of conversations not otherwise subject to interception under Chapter 119 of Title 18, United States Code, and must terminate upon attainment of the authorized objective, or in any event, at the end of fifteen (15) days, except Sundays (the day on which the policy bank is not in operation), from the date of this Order.

PROVIDING ALSO, that Fred F. Barlow shall provide the Court with a report on the fifth and tenth days following the date of this Order showing what progress has been made toward achievement of the authorized objective and the need for continued interception.

*Frank J. R. S.*  
UNITED STATES DISTRICT JUDGE

*7-11-73*  
DATED 7-11-73

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
IN THE MATTER OF THE APPLICATION OF THE  
UNITED STATES FOR AN ORDER AUTHORIZING THE  
INTERCEPTION OF WIRE COMMUNICATIONS

APPLICATION

-----X  
FRED F. BARLOW, Special Attorney with the Department  
of Justice, Organized Crime and Racketeering Section, being duly  
sworn, states:

This sworn application is submitted in support of an Order  
authorizing the interception of wire communications. This  
application has been submitted only after lengthy discussions  
concerning the necessity for such an application with various  
officials of the Organized Crime and Racketeering Section, United  
States Department of Justice, Washington, D.C., together with agents  
of the Federal Bureau of Investigation.

1. He is an "investigative or law enforcement officer of  
the United States" within the meaning of Section 2510(7) of Title 18,  
United States Code, that he is an attorney authorized by law to  
prosecute or participate in the prosecution of offenses enumerated  
in Section 2516 of Title 18, United States Code.

2. Pursuant to the powers conferred on him by Section 2516  
of Title 18, United States Code, the Attorney General of the United  
States, the Honorable Richard G. Kleindienst, has authorized this  
application for an Order authorizing the interception of wire  
communications. The letter of notification of approval from the  
Assistant Attorney General of the Criminal Division, the Honorable  
Henry E. Petersen and the memorandum of authorization approved by  
the Attorney General of the United States, the Honorable Richard G.  
Kleindienst are attached to this application as Exhibit A.

3. This application seeks authorization to intercept  
wire communications of James Napoli, Jr., also known as "Lefty,"  
Bari Mascitti, Anthony Di Matteo also known as "Tony Apples",  
Eugene Scafidi also known as "Bo", Rocco Riccardi also known as  
"Rocky", Robert Voulo, Joseph Simonelli also known as "Joe Black,"  
a person answering the telephone numbered 894-9195, and others as  
yet unknown concerning offenses enumerated: - . . . . . 4

United States Code; that is offenses involving the conducting, financing, managing, supervising, directing or owning all or part of an illegal gambling business in violation of Section 1955 of Title 18, United States Code, which offenses have been and are being committed by the aforementioned persons and others as yet unknown.

Section 1955 of Title 18, United States Code, was enacted as Section 803 of Title VIII, entitled Syndicated Gambling of the "Organized Crime Control Act of 1970", Public Law 91-452, 91st Congress, October 15, 1970.

Section 801 of Title VIII of this act contains special findings that illegal gambling involves wide-spread use of and has an effect upon interstate commerce and facilities thereof.

4. He has discussed all the circumstances of the above offenses with Special Agent Charles J. Parsons of the New York Office of the Federal Bureau of Investigation, who has directed and conducted the investigation herein, and has examined the affidavit of Special Agent Charles J. Parsons (attached to this application as Exhibit B and incorporated by reference herein) which alleges the facts therein in order to show that:

a. there is probable cause to believe that James Napoli, Jr. also known as "Lefty", Bari Mascitti, Anthony Di Matteo also known as "Tony Apples", Eugene Scafidi also known as "Bo", Rocco Riccardi also known as "Rocky", Robert Voulo, Joseph Simonelli also known as "Joe Black", a person answering the telephone numbered 894-9195, and others as yet unknown are each conducting, financing, managing, supervising, directing or owning all or part of a gambling business which (1) violates Article 225 of the New York State Penal Laws, (2) involves five or more persons who conduct, finance manage, supervise, direct or own all or part of such business, and (3) remains in substantially continuous operation for a period in excess of thirty (30) days or has a gross revenue of \$2,000 in any single day; and consequently

there is probable cause to believe that James Napoli, Jr. also known as "Lefty", Bari Mascitti, Anthony Di Matteo also known as "Tony Apples", Eugene Scafidi also known as "Bo", Rocco Riccardi also known as "Rocky", Robert Voulo, Joseph Simonelli also known as "Joe Black, a person answering the telephone numbered 894-9195, and others as yet unknown are committing and are about to commit offenses in violation of Section 1955 of Title 18, United States Code and are conspiring to commit such offenses in violation of Section 371 of Title 18, United States Code:

b. there is probable cause to believe that particular wire communications of Bari Mascitti, Anthony Di Matteo also known as "Tony Apples", Eugene Scafidi also known as "Bo", Robert Voulo, Joseph Simonelli also known as "Joe Black", a person answering the telephone numbered 894-9195, and others yet unknown concerning these offenses will be obtained through the interception, authorization for which is herewith applied for.

In particular these wire communications are expected to concern the conduct, financing, management, supervision, direction and ownership of a wagering and betting business, the duration and continuity of the operation of this business, the number, degree of participation and identity of persons active therein, the amount of frequency of bet to and from this business, and the amount of revenue involved in this betting business, all of which is more fully set forth in the affidavit incorporated herein.

c. normal investigative procedures reasonably appear to be unlikely to succeed, if tried further, as more fully set forth in the affidavit incorporated herein.

d. there is probable cause to believe that the telephone numbered 212-932-2708 located at Apartment 309, 8-15 27th Avenue, Queens, New York, and the telephone numbered 212-835-1163 located at 161-20 91st Street, Howard Beach, Queens, New York, have been and are being used by James Napoli, Jr., also known as "Lefty", Bari Mascitti, Anthony Di Matteo also known as "Tony Apples", Eugene Scafidi also known as "Bo", Rocco Riccardi also known as "Rocky", Robert Voulo, Joseph Simonelli also known as "Joe Black,"

a person answering the telephone numbered 894-9195 and others as yet unknown, in connection with the commission of the above-described offenses.

5. No previous application has been made to any judge for authorization to intercept or for approval of interception of wire or oral communications involving any of the same persons, facilities, or places specified herein, except the following:

On December 8, 1972, the Honorable Orrin J. Judd, United States District Judge, Eastern District of New York, signed an Order authorizing the interception of oral communications of Barry Russo, Anthony Di Matteo, also known as "Tony Apples" (referred to in the application as Pasquale Rossetti), and a male known only as John Doe D, at Apartment 309, 8-15 27th Street, Astoria, Queens, New York.

On January 15, 1973, the Honorable Jack B. Weinstein signed an Order authorizing the interception of oral communications of Barry Russo, Anthony Di Matteo, also known as "Tony Apples" Joseph Simonelli, also known as "Joe Black", Rocco Riccardi, also known as "Rocky", Phyllis Engert, and an individual referred to herein as John Doe D at the above premises.

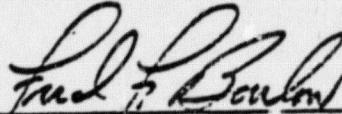
Wherefore, your affiant believes that probable cause exists to believe that each of the persons named in paragraph 3 is engaged in the commission of offenses involving the operation of a gambling business in violation of Article 225, New York State Revised Penal Laws, that each is conducting, financing, managing, supervising, directing, or owning, all or part of an illegal gambling business in violation of Section 1955 of Title 18, United States Code; that particular communications of Bari Mascitti, Anthony Di Matteo also known as "Tony Apples," Eugene Scafidi also known as "Bo", Robert Voulo, Joseph Simonelli also known as "Joe Black", a person answering the telephone numbered 894-9195, and others yet unknown, concerning these offenses will be intercepted; that normal investigative procedures reasonable appear unlikely to succeed if tried; and that there is probable cause to believe that particular communications of Bari Mascitti, Anthony Di Matteo also known as "Tony Apples", Eugene Scafidi also known as "Bo", Robert Voulo, Joseph Simonelli also known as "Joe Black,"

through the interception of wire communications to and from the premises telephone numbered 932-2708 located at Apartment 109, 8-15 27th Avenue, Astoria, Queens, New York, and the telephone numbered 835-1163, located at 161-20 91st Street, Howard Beach, Queens, New York.

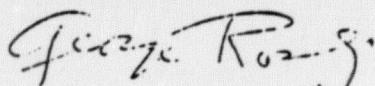
On the basis of the allegations contained in this application and on the basis of the affidavit of Special Agent Charles J. Parsons which is attached hereto and made a part ther of, applicant requests this Court to issue an Order pursuant to the power conferred on it by Section 2518 of Title 18, United States Code, authorizing the Federal Bureau of Investigation of the United States Department of Justice to intercept wire communication to and from the above-described telephones until communications are intercepted which reveal the manner in which James Napoli, Jr. also known as "Lefty," Bari Mascitti, Anthony Di Matteo also known as "Tony Apples," Eugene Scafidi also known as "Bo," Rocco Riccardi also known as "Rocky", Robert Voulo, Joseph Simonelli also known as "Joe Black," a person answering the telephone numbered 894-9195, and others as yet unknown, participate in this illegal gambling business, and which reveal the identities of their confederates, their places of operation, the nature of the conspiracy involved herein, or for a period of fifteen (15) days, excluding Sundays, (the days on which the "policy bank" is not in operation), from the date of this Order, whichever is earlier.

It is further requested that the Court issue an Order pursuant to the power conferred on it by Section 2518 (4) of Title 18, United States Code, directing that the New York Telephone Company, a communication common carrier as defined in Section 2510 (10) of Title 18, United States Code, shall furnish the applicant forthwith all information, facilities and technical assistance necessary to accomplish the interception unobtrusively with a minimum of interference with the service that such carrier is according the person whose conversations are to be intercepted, the furnishing of

such facilities or technical assistance by the New York Telephone Company to be compensated for by the applicant at the prevailing rates.

  
Fred F. Balkin  
Special Attorney

Subscribed to and sworn to before me  
this 21 day of February, 1973

  
( S. D. )

451  
UNITED STATES GOVERNMENT

DEPARTMENT OF JUSTICE

# Memorandum

TO : Henry E. Petersen  
Assistant Attorney General  
Criminal Division  
  
FROM : Attorney General

DATE: FEB 1 1973  
RGK:FFF:lp

SUBJECT: Authorization for Interception Order Application

This is with regard to your recommendation that I authorize an application to a Federal Judge of competent jurisdiction for an order under Title 18, United States Code, Section 2518, authorizing the interception of wire communications for a fifteen (15) day period to and from the telephones bearing numbers 212-932-2708, located at Apartment 309, 8-15 27th Avenue, Astoria, Queens, New York, and 212-835-1163, located at 161-20 91st Street, Howard Beach, Queens, New York, in connection with the investigation into possible violations of Title 18, United States Code, Sections 1955 and 371, by James Napoli, Jr., also known as Lefty, Bari Mascitti, Anthony DiMatteo, also known as Tony Apples, Eugene Scafidi, also known as Bo, Rocco Riccardi, also known as Rocky, Robert Voulo, Joseph Simonelli, also known as Joe Black, a person answering the telephone numbered 894-9195, and others as yet unknown.

Pursuant to the power conferred on me by Section 2516 of Title 18, United States Code, I hereby authorize the above-described application to be made by any investigative or law enforcement officer of the United States as defined in Section 2510(7) of Title 18, United States Code.

  
RICHARD G. KLEINDIENST

Attorney General

Date

2/1/73

Exh A

Department of Justice  
Washington 20530

FEB 2 - 1973

Denis E. Dillon  
Attorney in Charge  
Brooklyn Strike Force  
Brooklyn, New York

Dear Mr. Dillon:

This is to advise you that pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, the Attorney General has authorized an application to be made to a Federal Judge of competent jurisdiction for an order under Section 2518 of Title 18, United States Code, authorizing the interception of wire communications for a fifteen (15) day period to and from the telephones bearing numbers 212-932-2708, located at Apartment 309, 8-15 27th Avenue, Astoria, Queens, New York, and 212-835-1163, located at 161-20 91st Street, Howard Beach, Queens, New York, in connection with the investigation into possible violations of Title 18, United States Code, Sections 1955 and 371, by James Napoli, Jr., also known as Lafty, Bari Mascitti, Anthony DiMatteo, also known as Tony Apples, Eugene Scafidi, also known as Bo, Rocco Riccardi, also known as Rocky, Robert Voulo, Joseph Simonelli, also known as Joe Black, a person answering the telephone numbered 894-9195, and others as yet unknown. The memorandum of authorization approved by the Attorney General is attached hereto.

Accordingly, you or any other attorney on your staff who is an investigative or law enforcement officer of the United States within the meaning of Section 2510(7) of Title 18, United States Code, are authorized to make the above-described application.

Sincerely,

*Henry E. Petersen*  
HENRY E. PETERSEN  
Assistant Attorney General

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

IN THE MATTER OF THE APPLICATION  
OF THE UNITED STATES FOR AN ORDER  
AUTHORIZING THE INTERCEPTION OF  
WIRE COMMUNICATIONS

AFFIDAVIT

STATE OF NEW YORK  
COUNTY OF KINGS  
EASTERN DISTRICT OF NEW YORK ss:

CHARLIE J. PARSONS, Special Agent, Federal Bureau of  
Investigation, New York, being duly sworn states:

I am an "investigative law enforcement officer. . ." of the United States within the meaning of Section 2510(7) of Title 18, United States Code--that is, an officer of the United States who is empowered by law to conduct investigations of and to make arrests for offenses enumerated in Section 2516 of Title 18, United States Code.

I make this affidavit in support of an application which seeks authorization to intercept wire communications concerning offenses involving violations of Title 18, United States Code, Section 1955, and a conspiracy to violate said statute in violation of Title 18, United States Code, Section 371, which have been and are being committed by JAMES NAPOLI, JR. also known as Lefty, BARI MASCITTI, ANTHONY DI MATTEO also known as Tony Apples, EUGENE SCAFIDI also known as Bo, ROCCO RICCARDI also known as Rocky, ROBERT VOULO, JOSEPH SIMONELLI also known as Joe Black, a person answering the telephone numbered 894-9195, and others as yet unknown.

I have supervised the conduct of the investigation of this offense and, as a result of my personal participation in that investigation and of reports made to me by agents under my direction,

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I am familiar with all the circumstances of the offenses. On the basis of that familiarity, I allege the facts contained in the numbered paragraphs below to show that:

A. There is probable cause for belief that JAMES NAPOLI, JR. also known as Lefty, BARI MASCITTI, ANTHONY DI MATTEO also known as Tony Apples, EUGENE SCAFIDI also known as Bo, ROCCO RICCARDI also known as Rocky, ROBERT VOULO, JOSEPH SIMONELLI also known as Joe Black, a person answering the telephone numbered 894-9195, and others as yet unknown have committed, and are committing, will continue to commit and will continue to conspire to commit offenses involving the conducting, financing, managing, supervising, directing or owning of all or part of an illegal gambling business in violation of Article 225, Sections 225.0 through 225.40, of the New York State Revised Penal Law, and also in violation of Sections 1955 and 371 of Title 18, United States Code.

b. There is probable cause for belief that communications concerning those offenses will be obtained through the interception of wire communications to and from the telephone numbered 212-932-2708, and located at Apartment 309, 8-15 27th Avenue, Astoria, Queens, New York, and the telephone numbered 212-835-1163, located at 161-20 91st Street, Howard Beach, Queens, New York.

c. Normal investigative procedures have been tried and reasonably appear unlikely to succeed if tried further.

No previous applications are known to have been made to any judge for authorization to intercept or for approval of interception of wire or oral communications involving any of the persons, facilities or places specified herein except the following:

On December 8, 1972, the Honorable CRRIN J. JUDD, United States District Judge, Eastern District of New York, signed an Order authorizing the interception of oral communications of BARRY RUSSO, ANTHONY DI MATTEO, also known as Tony Apples (referred to in the application as PASQUALE ROSSETTI), and a

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male known only as JOHN DOE D, at Apartment 309, 8-15 27th Street, Astoria, Queens, New York.

On January 15, 1973, the Honorable JACK B. WEINSTEIN United States District Judge, Eastern District of New York signed an Order authorizing the interception of oral communications of BARRY RUSSO, ANTHONY DI MATTEO, also known as Tony Apples, JOSEPH SIMONELLI, also known as Joe Black, ROCCO RICCARDI, also known as Rocky, PHYLLIS ENGERT, and an individual referred to herein as JOHN DOE D at the above premises.

The facts alleged in my affidavits dated May 1, and December 8 and 20, 1972, and January 15 and 18, 1973 are incorporated herein by this reference, and copies of the said affidavits are annexed as Exhibits A, B, C, D, and E.

FACTS SHOWING PROBABLE CAUSE

1. Hereafter, unless specified otherwise, all telephone numbers are in the (212) area, and all addresses are streets, in Brooklyn, New York. Also, all excerpted conversations are substantially verbatim, but are not to be construed as exact.

2. Pursuant to Judge WEINSTEIN's order dated January 15, 1973, oral conversations of BARI MASCITTI (referred to in prior affidavits also as BARRY RUSSO), ANTHONY DI MATTEO, also known as Tony Apples (referred to sometimes in prior affidavits as PASQUALE JOSEPH ROSETT), PHYLLIS ENGERT, and a female known only as COLETTE, have been intercepted at the subject's premises, Apartment 309, 8-15 27th Avenue, Astoria, Queens, New York, from January 15, 1973 through the date of this affidavit, (excluding Sundays). From the content of their intercepted conversations, it is apparent that MASCITTI and DI MATTEO continue to be bank workers in a policy gambling operation. Their conversations with each other are replete with references to the "work", "overlooks", "overcharges", "claims", "hits", and the numbers (both Brooklyn and New York) for each day.

3. However, in addition to conversing between themselves, with PHYLLIS ENGERT, and to a very limited extent with the female known only as COLETTE, MASCITTI and DI MATTEO conversed with other persons on the telephone numbered 932-2708, in the premises of Apartment 309, 8-15 27th Avenue, Astoria, Queens, New York. Examples of these telephonic conversations, and references to persons with whom it is expected they may converse on the telephone follow.

4. On January 15, 1973, among the conversations intercepted, were the following excerpts:

a. Between 4:25 and 5:00 PM, after DI MATTEO had talked to MASCITTI about going out on his own, and beginning his own policy business, the following conversation occurred:

DI MATTEO (D) "deserve a chance just like you, whatever I'm doing."

MASCITTI. (M) "what did you have for me today. You get the finest books, just because you can't (garbled)."

D: "You don't like it, go see JIMMY NAPOLI."

M: "You can't. \$6000 JOE, and when it's done and you're done paying him, then I can see him."

5. On January 16, 1973, among the other conversations intercepted, were the following:

a. M: "What is JOE's? . . . (sound of phone being dialed). . . What's JOE's old number, Apples?" D: "Uh, . . ."

M: "You forgot?"

D: "651. . . 651, 862 uh 862 the last number."

M: "8662"

D: "651-6862 right?"

M: "I don't remember." (sound of telephone being dialed)

M: "Bo? What's going on? What is it 602? Rock's telling me 703. . . what is it with 96 (inaudible) the end of the tape. (rest of conversation inaudible).

b. The informant referred to an informant number 1 in my affidavit dated May 1, 1972, had told me on several occasions that "Bo" is a nickname used by EUGENE SCAFIDI (See my affidavits dated May 1, 1972 and December 8, 1972, for prior information on SCAFIDI and his involvement in this policy operation). SCAFIDI's home telephone, 835-1163, was dialed numerous times during the period of operation of the pen register December 21, 1972 through January 9, 1973. See paragraph 5 of my affidavit dated January 18, 1973.

c. Later MASCITTI was overheard in a telephone conversation, which, judging from its content and the nickname "Bo", was most probably with EUGENE SCAFIDI. MASCITTI said among other things: "You know what I mean, Bo? All right, the book has no claim . . . All right, Bo . . . but now if 61-A (most probably referring to the code number of a policy "collector") . . . if Bobby (probably referring to ROBERT VOULO) wants, I'll go back out tonight . . . (inaudible) just to hold off with this 61-A guy without getting involved in an uproar. Now I'll just find out tonight, because I can't get another yelling by these guys. A quarter. You know what I mean? . . . I still got 703 . . . but I don't what the hell is BLACK (most probably referring to JOE BLACK, running another policy bank in the same operation; see my affidavit dated January 15, 1973) doing if he's wrong . . . I don't know Bo . . . What are you taking it out of, the News and the Post? . . . (referring to the race track betting totals used to calculate the policy "numbers" each day).

6. On January 17, 1973, due to the presence of the female known only as COLLETTE, and the operation of a television set on the subject premises, little if any intelligible conversation was intercepted.

7. On January 18, 1973, among other conversation, the following was intercepted:

a. M: "Overcharged. Overcharged."

D: "(inaudible)"

M: "You've got to say it nice. I got hollered at the last week. BOBBY said 'no pay. I'm overlooking your pay'.

'You are overlooking my work, I'm overlooking your pay - that week.'

b. At about 5:00 PM, January 18, 1973, Judge WEINSTEIN signed an order authorizing the operation of the pen register on the telephone numbered 932-2708.

c. At 5:37 PM, DI MATTEO said "BARRY get the number."

d. At 5:40 PM, the number 894-9195, the source of the "numbers" each day, was dialed from the subject telephone (see paragraph 4 of my affidavit dated January 18, 1973).

e. At 5:41 PM, the following conversation was intercepted:

D: "Get the number, BARRY?"

M: "What?"

D: "Quarter to six. Did you get the number?"

M: "246."

f. At approximately 6:12 PM, MASCITTI said "we've got to get it all together today. . . just when I got to go see BOBBY tomorrow".

8.

a. On January 19, 1973, again because of the interference of the female named COLETTE, and the television set, little if any intelligible conversation was intercepted.

b. On January 12, 1973, visual surveillance by Agents of the Federal Bureau of Investigation, working under the affiant, disclosed that MASCITTI, after leaving his residence, met with ROBERT VOULO at MARTIN GRIFFIN SR.'s residence, 86-17 157th Avenue, Howard Beach, Queens, New York, shortly before going to the bank at the subject premises.

c. Among the few bits of intelligible conversation intercepted on this afternoon was a conversation relating in substance that someone in JOE BLACK's office was having a beef about their salary, then (inaudible) see JIMMY NAPP.

9. On January 20, 1973, along with other conversation, the following is intercepted:

a. At about 3:43 PM, DI MATTEO, referring to a conversation the prior night with MICHAEL DE LUCA and JAMES NAPOLI, JR.,

said to MASCITTI: "Your father said last night, he said, I should've laid six guys off, he said, right? When he's sitting down. There's only three guys working three days, and three guys work another three days. So I said to him, I says, Mike, I says, we need another man, you know? He said, what'd you say? I said we need another man. So he laughed. I said you'll never get rid of me Mike, you either gotta kill me. I'm with you for life now with what you're paying me. So now he walked out, so Jimmy, Jr., is eating a hero like this, and he said, well, I'll tell you one, and I said who, who in the hell is he talking about (inaudible). Six guys may be working three days a week. He goes, he's only got six men under him and he says you're one of them. Right. One day, Rocky got paid 250 last night, he got paid 300 on the other job, is 550 paid on this other job, 250 is 800, right? He (inaudible) another 50, 850, he wanted 500. I said you show me anybody to get it off, I'll get it off. (inaudible) See my prior affidavits for the facts showing that Mikey, Jimmy, Jr., and Rocky, are the nicknames for JAMES NAPOLI, JR., MICHAEL DE LUCA and ROCCO RICCIARDI.

b. Several seconds later DI MATTEO said: "Cause I put 2000 (inaudible) your father, and I won 10,000."

10. On January 23, 1973, among other conversation, the following was intercepted:

a. During a conversation that afternoon between MASCITTI and DI MATTEO, a meeting that night at 6:30 at "Crisci's" was mentioned. Affiant knows from prior surveillances that Crisci's is a restaurant located at 593 Lorimer, Williamsburg, and affiant and other agents have observed numerous meetings of JAMES V. NAPOLI, SR. and his suspected employees in this gambling operation at the said restaurant, from 1971 through 1973.

b. At about 6:45 PM the same evening, BARI MASCITTI and ANTHONY DI MATTEO were observed by affiant and others to drive to Crisci's in the same car, and then to meet with JAMES NAPOLI, JR., at the bar inside. Later, JAMES NAPOLI, JR., was observed by agents under affiant's direction to appear at the

Street, New York, New York, and to carry inside the townhouse an object appearing to be a cream-colored envelope. He was met at the door by his father. After remaining inside for about 40 minutes, NAPOLI, JR., departed, carrying a transparent shopping bag containing a shoe box.

NEED FOR INTERCEPTION

11. My experience and the experience of other agents has shown that gambling raids and searches of gamblers and their gambling establishments have not, in the past, resulted in the gathering of physical or other evidence to prove all elements of the offenses against all involved within purview of Title 18, United States Code Section 1955. I have found through my experiences and the experiences of other Special Agents who have worked on gambling cases, that gamblers frequently do not keep permanent records. If such records have been maintained, gamblers immediately, prior to or during a physical search, destroy them. Additionally, records that have been seized in past gambling cases generally havenot been sufficient to establish all elements of a Federal gambling offense because such records are difficult to interpret and many times are of little or no significance without further knowledge of the gambler's activities and nature of the operation.

12. Affiant knows from cumulative experience described herein and in Exhibits A-E that the activities and conduct of ANTHONY DI MATTEO also know as "Tony Apples" and BARI MASCITTI are entirely consistent with the operation of a "policy bank" or office. Policy bank workers play an integral part in the management of illegal gambling businesses inasmuch as they are responsible for tallying and confirming bets and winning numbers on a daily basis in order for "hits" or winning wagers to be paid the following day. Bank workers are trusted employees, and they are the main link in the chain of connection between the lower echelon runners, controllers, and pick-up men, with the upper echelon figures who do not physically participate in

the daily operation, but who actually manage, supervise, finance, own and direct large scale policy operations and profit from the revenue generated by them. I know from my experience that large scale illegal policy operations normally utilize a number of banks or offices in different locations with different employees. If one bank is discovered by law enforcement officials, its detection does not disrupt the entire operation. Experience has also demonstrated that searches and seizures in one location and arrest of employees in the lower echelon is often just a temporary disruptive influence, solved by merely replacing employees and setting up in a new location.

b. Expert analysis by the FBI Laboratory Gambling Section of evidence seized in banks of this operation have established that one bank may handle in excess of \$10,000,000.00 in annual wagers. Allowing for adequate compensation for runners, controllers, pick-up men and bank workers, the additional gambling revenues are impossible to trace through the limited investigative technique of physical surveillance. In addition, this particular gambling operation is designed so that all monies are maintained separately from the betting records. Previous searches conducted on banks in this operation by agents working under affiant's direction have yielded gambling records, but no monies. I have found through my experience and the experience of other Special Agents who have worked on gambling cases, that records that have been seized in past gambling raids in this operation have not been sufficient to establish all elements of a Federal Offense against the upper echelon figures who actually direct and profit from the gambling operation because of their deliberately limited physical contact and participation. It is anticipated that interception of wire communications between trusted bank employees will result in tracing the channels of illegal gambling revenues to their ultimate destination; establishing the physical locations

of other policy banks in this operation; and establishing the identities of others involved in the continuing conspiracy of maintaining an illegal gambling business, and their connection with other upper echelon gambling personnel.

14. For the reasons set forth in paragraphs 11 through 13, all normal avenues of investigation and prosecution have been exhausted or have been considered too risky to attempt. The only reasonable and feasible investigative procedure remaining which can furnish the required quantum of evidence sufficient to prove beyond a reasonable doubt that JAMES NAPOLI, JR., also known as Lefty, BARI MASCITTI, ANTHONY DI MATTEO also known as Tony Apples, EUGENE SCAFIDI also known as Bo, ROCCO RICCARDI also known as Rocky, ROBERT VOULO, JOSEPH SIMONELLI also known as Joe Black, a person answering the telephone numbered 294-9195, and others as yet unknown are conducting, financing, managing, supervising, directing or owning all or part of an illegal gambling business in violation of Title 18, United States Code Section 1955, and a conspiracy to commit such acts, in violation of Title 18, United States Code, Section 371 is to intercept the wire communications of the aforementioned persons to and from the telephone numbered 212-932-2708, located at Apartment 309, 8-15 27th Avenue, Astoria, Queens, New York, and the telephone numbered 212-835-1163, located at 161-20 91st Street, Howard Beach, Queens, New York.

15. Inasmuch as the gambling operation described herein is apparently a continuing criminal conspiracy, the evidence sought through the continued interception of communications to and from the subject premises is expected to be obtained on a continuing basis on several days succeeding the first receipt of the communications which are the objective of this application. Therefore, it is requested that these interceptions not terminate when the sought communications are first obtained, but continue until interception reveals the identities of the confederates of

JAMES NAPOLI, JR., also known as Lefty, BARI MASCITTI, ANTHONY DI MATTEO also known as Tony Apples, EUGENE SCAFIDI also known as Bo, ROCCO RICCARDI also known as Rocky, ROBERT VOULO, JOSEPH SIMONELLI also known as Joe Black, a person answering the telephone numbered 894-9195, and others as yet unknown, their places of operation, and the nature of the conspiracy involved therein, or for a period of fifteen (15) days, excluding Sundays (the day on which the policy bank is not in operation) from the date of the order, whichever is earlier.

Wherefore, I submit that the information supplied by Exhibits A-E incorporated herein, surveillances and oral communications which have previously been intercepted provide sufficient facts to establish probable cause that JAMES NAPOLI, JR. also known as Lefty, BARI MASCITTI, ANTHONY DI MATTEO also known as Tony Apples, EUGENE SCAFIDI also known as Bo, ROCCO RICCARDI also known as Rocky, ROBERT VOULO, JOSEPH SIMONELLI also known as Joe Black, a person answering the telephone numbered 894-9195, and others as yet unknown have been and are now committing offenses involving the conducting, financing, managing, supervising, directing or owning all or part of an illegal gambling business in violation of Section 225.0 through 225.40 of the New York Penal Law and also in violation of Sections 371 and 1955 of Title 18, United States Code.

Section 803 of Title 18, entitled, "Syndicated Gambling of the Organized Crime Control Act of 1970", Public Law 91-452, 91st Congress, approved October 15, 1970, amended Chapter 95, Title 18, United States Code by adding a new section, section 1955, Prohibition of Illegal Gambling Business. Section 801 of Title VIII of the Act contains special finding that illegal gambling involves widespread use of and has an effect upon interstate commerce and the facilities thereof.

*Philip J. Parsons*  
CHARLIE J. PARSONS

Subscribed to and sworn to  
before me this 11 day

22

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

IN THE MATTER OF THE APPLICATION  
OF THE UNITED STATES FOR AN ORDER  
AUTHORIZING THE INTERCEPTION OF  
WIRE COMMUNICATIONS

AFFIDAVIT

STATE OF NEW YORK) ss:  
COUNTY OF KINGS )

CHARLIE J. PARSONS, Special Agent, Federal Bureau of Investigation, New York, being duly sworn states:

I make this affidavit to supplement the one of even date which seeks authorization to intercept wire communications concerning offenses involving violations of Title 18, United States Code, Section 1955, and a conspiracy to violate said statute in violation of Title 18, United States Code, Section 371, which have been and are being committed by JAMES NAPOLI, JR., also known as Lefty, BARI MASCITTI, ANTHONY DI MATTEO, also known as Tony Apples, EUGENE SCAFIDI, also known as Bo, ROCCO RICCARDI, also known as Rocky, ROBERT VOULO, JOSEPH SIMONELLI, also known as Joe Black, a person answering the telephone numbered 894-9195, and others as yet unknown.

Additional facts showing probable causes:

1. During the period of operation of the pen register monitoring device on the subject telephone 932-2708, January 19 - 31, 1973, the following pertinent telephone numbers were dialed:

2. Every day, excluding Sundays, 894-9195, the source of the policy "numbers" (see paragraph 4 of my affidavit dated January 18, 1973). On January 22, 1973, 545-8811, the number of the telephone subscribed to by Irmo Mascitti, 21-06 Hoyt Avenue, Astoria, Queens, which surveillance has shown to be the residence of Michael DeLuca, Bari Mascitti's "stepfather". On January 24, 27 (twice) and 31, 1973, the subject telephone number, 835-1163; on January 25, (five times) and 26, 1973, 835-4456, Martin Griffin (see prior exhibits).

Additional facts showing need to intercept:

3. In the Napoli investigation, which has been under affiant's direction since the Spring in 1971, the following techniques have been used: Visual surveillances and informant information resulted in searches and seizures of persons and premises on or about June 15, 1971. The evidence gained therefrom resulted in indictments and a trial against 8 persons, of whom 2 pled guilty and the remaining 6 were acquitted by a jury, even though 2 of them had fingerprints on policy work seized in a policy bank, in addition to incriminating surveillances.

4. Other surveillances and informant information led to searches and seizures of multiple persons, premises and automobiles on or about February 2 and 17, and May 1, 1972. In addition, persons implicated by the evidence obtained through the surveillances and searches and seizures were immunized and testified before a Grand Jury in the Eastern District of New York. However, since there existed no prosecutable evidence which could be used to gain testimony concerning persons higher in this gambling operation, these persons' testimony implicated only those people already implicated by the tangible evidence, and Martin Griffin, Jr., who had died in a motorcycle accident in July, 1972.

5. A prior court authorized interception (1971) of wire communications to and from James Napoli, Sr.'s telephone, numbered 212-889-7679, at 216 East 31st Street, New York, New York, and the one at the Highway Lounge, 362 Metropolitan Avenue, numbered 384-9615, had resulted in minimal prosecutable evidence.

Additional prior interception order.

6. On ~~c.~~ ~~at~~ May 15, 1970, the Honorable Jacob B. Mishler, United States District Judge, for the Eastern District of New York, signed an Order authorizing the interception of wire communications of James V. Napoli, James Vincent (sic.) Napoli, Jr., and others then unknown to and from the telephone numbered 212-384-9615, located at the Hi-Way Lounge, 362 Metropolitan Avenue, Brooklyn, New York; on the same date, the Honorable Thomas F. Croake, United States District Judge for the Southern District of New York, signed an Order authorizing the interception of wire communications of James Vincent Napoli, James Vincent (sic) Napoli Jr. and others then unknown to and from the telephone numbered 212-889-7679, located at 216 East 31st Street, New York, New York (Napoli, Sr.'s residence).

*Charlie J. Parsons*  
CHARLIE J. PARSONS  
Special Agent  
Federal Bureau of Investigation

Sworn to before me  
this 17 day of  
February, 1973.

*Charlie Parsons*  
4-1-73

27-31-CR-1968  
27-31-CR-1968

II: NO. 1000 OF THE APPLICATION FOR THE  
UNITED STATES FOR AN ORDER AUTHORIZING  
THE CONTINUED INTERCEPTION OF ORAL  
COMMUNICATIONS

ORDER

AUTHORIZING CONTINUED INTERCEPTION OF ORAL COMMUNICATIONS

II: Special Agents of the Federal Bureau of Investigation  
United States Department of Justice

Application under oath having been made before me by Fred J. Barlow, Special  
Attorney with the Organized Crime and Racketeering Section of the United States Depart-  
ment of Justice, and an "Investigative or law enforcement officer" as defined in  
Section 2510 (7) of Title 18, United States Code, for an Order authorizing the con-  
tinued interception of oral communications pursuant to Section 2518 of Title 18,  
United States Code, and full consideration having been given to the matter set  
forth therein, the Court finds:

a) there is probable cause to believe that James Vincent Napoli, Jr., also  
known as Jimmy Napoli; James V. Napoli, Jr., also known as Jimmy, Jr. and Lefty; Michael  
DeLuca, also known as Mikey, Jr.; Robert Vacolo, also known as Bobby and "the Kid"; Diogo  
Acciari, also known as Dickey; a male now known only as Ray; Richard Baccetta, also known  
as Shotgun; and others as yet unknown have committed and are continuing to commit offenses  
involving the conducting, financing, managing, supervising, directing, or owning in whole  
or part, a gambling business which (1) violates Article 235 of the New York State Revised  
Penal Laws, (2) involves five or more persons who conduct, finance, manage, supervise,  
direct, or own all or part of such business, and (3) remains in substantially continuous  
operation for a period in excess of thirty (30) days or has a gross revenue of \$2,000 in  
any single day, in violation of Section 1053 of Title 18, United States Code, and the  
continuing to commit said federal offenses in violation of Section 371, Title 18, United  
States Code.

b) there is probable cause to believe that probable oral communications of  
James Vincent Napoli, Jr., also known as Jimmy Napoli; James V. Napoli, Jr., also known as  
Jimmy, Jr. and Lefty; Michael DeLuca, also known as Mikey, Jr.; Robert Vacolo, also known  
as Bobby and "the Kid"; Diogo Acciari, also known as Dickey; a male now known only as Ray;  
Richard Baccetta, also known as Shotgun; and others concerning these offenses, in  
order to effect the continued interception, authorization is granted in form, as follows:

In particular, these oral communications will concern the conduct, management, supervision, direction and ownership of a wagering and betting business, duration and continuity of the operation of this business, the number, degree of participation and identity of persons active thereto, the location from which the participants operate, the origin and destination of bets, and the amount of revenue involved in such betting business.

c) normal investigative procedures reasonably appear to be unlikely to succeed if tried further.

d) there is probable cause to believe that the premises located at The Highway Lounge, 362 Metropolitan Avenue, Williamsburg, Brooklyn, New York, have been and are being used by James Vincent Napoli, Sr., also known as Jimmy Napp; James V. Napoli, Jr., also known as Jimmy, Jr. and Lefty; Michael DeLuca, also known as Mickey, Jr.; Robert Voula, also known as Bobby and "the Kid"; Diego Assaro, also known as Dickey; a male now known only as Ray; Richard Bascetta, also known as Shotgun; and others as yet unknown in connection with the commission of the above-described offenses.

WHEREFORE, it is hereby ordered that:

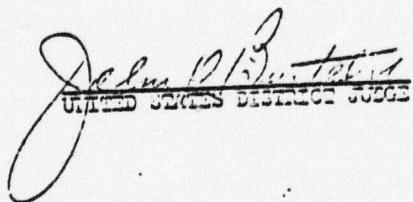
Special Agents of the Federal Bureau of Investigation, United States Department of Justice, are authorized pursuant to application by the Attorney General of the United States, the Honorable Richard G. Kleindienst, under powers conferred on the Attorney General by Section 2316 of Title 10, United States Code, to continue to intercept oral communications of James Vincent Napoli, Sr., also known as Jimmy Napp; James V. Napoli, Jr., also known as Jimmy, Jr. and Lefty; Michael DeLuca, also known as Mickey, Jr.; Robert Voula, also known as Bobby and "the Kid"; Diego Assaro, also known as Dickey; a male now known only as Ray; Richard Bascetta, also known as Shotgun; and others as yet unknown concerning the above-described offenses at the premises located at The Highway Lounge, 362 Metropolitan Avenue, Williamsburg, Brooklyn, New York.

Such interception shall continue until communications have been intercepted which reveal the manner in which James Vincent Napoli, Sr., also known as Jimmy Napp; James V. Napoli, Jr., also known as Jimmy, Jr. and Lefty; Michael DeLuca, also known as Mickey, Jr.; Robert Voula, also known as Bobby and "the Kid"; Diego Assaro, also known as Dickey; a male now known only as Ray; Richard Bascetta, also known as Shotgun; and others as yet unknown participate in this illegal gambling business and which reveal the identities of their confederates, their places of operation and the nature of the conspiracies of their confederates. After a period of fifteen (15) days (minimum), (maximum) from the issuance of this Order, whichever is earlier.

PROVIDING ALSO, this authorization to continue to intercept oral communications shall be executed as soon as practicable after signing of this Order and shall be conducted in such a way as to minimize the interception of conversations not otherwise subject to interception under Chapter 119 of Title 18, United States Code, and must terminate upon attainment of the authorized objective, or in any event, at the end of fifteen (15) day (excluding Sundays) from the date of this Order.

PROVIDING ALSO, that electronic surveillance of the oral communications of the above-named subjects shall occur at the above-described premises only where it has been determined that at least one of the above-named subjects is at the above-described premises.

PROVIDING ALSO, that Fred F. Barlow, shall provide the Court with a report on the fifth and tenth days following the date of this Order showing what progress has been made toward achievements of the authorized objective and the need for continued interception.

  
John D. Blanton  
UNITED STATES DISTRICT JUDGE

Dated:

July 3 (1973)

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X  
IN THE MATTER OF THE APPLICATION OF THE  
UNITED STATES FOR AN ORDER AUTHORIZING  
THE CONTINUED INTERCEPTION OF ORAL  
COMMUNICATIONS

-----X  
APPLICATION

Fred F. Barlow, Special Attorney with the Department of Justice, Organized Crime and Racketeering Section, being duly sworn, states:

This sworn application is submitted in support of an Order authorizing the continued interception of oral communications. This application has been submitted only after lengthy discussions concerning the necessity for such an application with various officials of the Organized Crime and Racketeering Section, United States Department of Justice, Washington, D.C., together with agents of the Federal Bureau of Investigation.

1. He is an "investigative or law enforcement officer of the United States" within the meaning of Section 2510 (7) of Title 18, United States Code, that he is an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516 of Title 18, United States Code.

2. Pursuant to the powers conferred on him by Section 2516 of Title 18, United States Code, the Attorney General of the United States, the Honorable Richard G. Kleindienst, has authorized this application for an Order authorizing the continued interception of oral communications. The letter of notification of approval from the Assistant Attorney General of the Criminal Division, the Honorable Henry E. Petersen and the memorandum of authorization approved by the Attorney General of the United States, the Honorable Richard G. Kleindienst are attached to this application as Exhibit A.

3. This application seeks authorization to continue to intercept oral communications of James Vincent Napoli, Sr., also known as Jimmy Napp; James V. Napoli, Jr., also known as Jimmy, Jr. and Lefty; Michael DeLuca, also known as Mikey, Jr.; Robert "Woulo, also known as Bobby and "the kid"; Diego Assaro, also known as Dicky; a male now known only as Ray; Richard Bascetta, also known as Shotgun; and others as yet unknown concerning offenses enumerated in Section 2516 of Title 18, United States Code; that is offenses involving the conducting, financing, managing, supervising, directing, or owning all or part of an illegal gambling business in violation of Section 1955 of Title 18, United States Code, and conspiring to commit such offenses in violation of Section 371 of Title 18, United States Code, which offenses

Section 1955 of Title 18, United States Code, was enacted as Section 801 of Title VIII, entitled "Syndicated Gambling" of the Organized Crime Control Act of 1970, Public Law 91-452, 91st Congress, October 15, 1970.

Section 801 of Title VIII of this act contains special findings that illegal gambling involves wide-spread use of and has an effect upon interstate commerce and facilities thereof.

4. He has discussed all the circumstances of the above offenses with Special Agent Charlie J. Parsons of the New York Office of the Federal Bureau of Investigation, who has directed and conducted the investigation herein, and has examined the affidavit of Special Agent Charlie J. Parsons (attached to this application as Exhibit B and incorporated by reference herein) which alleges the facts therein in order to show that:

a.) there is probable cause to believe that James V. Napoli, Sr., also known as Jimmy Napp; James V. Napoli, Jr., also known as Jimmy, Jr. and Lefty; Michael DeLuca, also known as Mikey, Jr.; Robert Voulo, also known as Bobby and "the kid"; Diego Assaro, also known as Dicky; a male now known only as Ray; Richard Bascetta, also known as Shotgun; and others yet unknown are each conducting, financing, managing, supervising, directing, or owning all or part of a gambling business which (1) violates Article 225 of the New York State Penal Laws, (2) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business, and (3) remains in substantially continuous operation for a period in excess of thirty (30) days or has a gross revenue of \$2,000 in any single day; and consequently there is probable cause to believe that James Napoli, Sr., also known as Jimmy Napp; James V. Napoli, Jr., also known as Jimmy, Jr. and Lefty; Michael DeLuca, also known as Mikey, Jr.; Robert Voulo, also known as Bobby and "the kid"; Diego Assaro, also known as Dicky; a male now known only as Ray; Richard Bascetta, also known as Shotgun; and others as yet unknown are committing and continue to commit offenses in violation of Section 1955 of Title 18, United States Code and are conspiring to commit such offenses in violation of Section 371 of Title 18, United States Code;

b.) there is probable cause to believe that particular oral communications of James V. Napoli, Sr., also known as Jimmy Napp; James V. Napoli, Jr., also known as Jimmy, Jr. and Lefty; Michael DeLuca, also known as Mikey, Jr.; Robert Voulo, also known as Bobby and "the kid"; Diego Assaro, also known as Dicky; a male now known only as Ray; Richard Bascetta, also known as Shotgun; and others concerning these offenses will be obtained through the continued interception, authorization for which is herewith applied for.

In particular these oral communications are expected to concern the conduct, financing, management, supervision, direction and ownership of a wagering and betting business, the duration and continuity of the operation of this business, the number, degree of participation and identity of persons active therein, the amount and frequency of bet to and from this business, and the amount of revenue involved in this betting business, all of which is more fully set forth in the affidavit incorporated herein.

c.) normal investigative procedures reasonably appear to be unlikely to succeed, if tried further, as more fully set forth in the affidavit incorporated herein.

d.) there is probable cause to believe that the premises located at The Highway Lounge, 362 Metropolitan Avenue, Williamsburg, Brooklyn, New York, have been and are being used by James V. Napoli, Sr., also known as Jimmy Napp; James V. Napoli, Jr., also known as Jimmy, Jr. and Lefty; Michael DeLuca, also known as Mikey, Jr.; Robert Voulo, also known as Bobby and "the kid"; Diego Assaro, also known as Dicky; a male now known only as Ray; Richard Bascetta, also known as Shotgun; and others as yet unknown, in connection with the commission of the above-described offenses.

5. No previous application has been made to any judge for authorization to intercept or for approval of interception of wire or oral communications involving any of the same persons, facilities, or places specified herein, except the following:

On May 18, 1970, Honorable Jacob S. Mishler, United States District Judge, Eastern District of New York, signed an Order authorizing the interception of wire communications of James V. Napoli; James Vincent (sic.) Napoli, Jr.; and others then unknown to and from the telephone numbered 212-384-9615, located at The Highway Lounge, 362 Metropolitan Avenue, Brooklyn, New York; on the same date, the Honorable Thomas F. Croake, United States District Judge for the Southern District of New York, signed an Order authorizing the interception of wire communications of James Vincent Napoli; James Vincent (sic.) Napoli, Jr.; and others then unknown to and from the telephone numbered 212-889-7679, located at 216 East 31st Street, New York, New York, (Napoli, Sr.'s residence).

On December 8, 1972, the Honorable Orrin J. Judd, United States District Judge, Eastern District of New York, signed an Order authorizing the interception of oral communications of Barry Russo; Anthony DiMatteo; also known as Tony Apples (referred to in the application as Pasquale Rossetti); and a male known only as John Doe D, at Apartment 309, 8-15 27th Street, Astoria, Queens, New York.

On April 12, 1972, the Honorable John R. Bartels, United States District Judge, Eastern District of New York, signed an Order authorizing the interception of oral communications at the premises of The Highway Lounge, 362 Metropolitan Avenue, Williamsburg, Brooklyn, New York, in connection with the investigation into possible violations of Title 18, United States Code, Sections 1955 and 371 by James Vincent Napoli, Sr., also known as Jimmy Napp; James Napoli, Jr., also known as Jimmy, Jr. and Lefty; Martin Casella, also known as Motts; Anthony DiMatteo, also known as Tony Apples; Michael DeLuca, also known as Mikey, Jr.; Richard Bascetta, also known as Shotgun; and others.

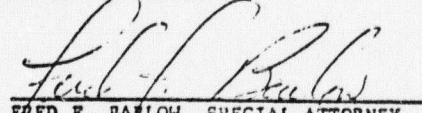
On January 15, 1973, the Honorable Jack B. Weinstein, United States District Judge, Eastern District of New York, signed an Order authorizing the interception of oral communications of Barry Russo, Anthony DiMatteo, also known as Tony Apples; Joseph Simonelli, also known as Joe Black; Rocco Riccardi, also known as Rocky; Phyllis Engert; and an individual referred to herein as John Doe D at the above premises.

On February 20, 1973, the Honorable George Rosling, United States District Judge, Eastern District of New York, signed an Order authorizing the interception of wire communications to and from the telephones bearing numbers 212-932-2708, located at Apartment 309, 8-15 27th Avenue, Astoria, Queens, New York, and 212-835-1163, located at 161-20 91st Street, Howard Beach, Queens, New York, in connection with the investigation into possible violations of Title 18, United States Code, Sections 1955 and 371 by James Napoli, Jr., also known as Lefty; Bari Mascitti; Anthony DiMatteo, also known as Tony Apples; Eugene Scafidi, also known as Bo; Rocco Riccardi, also known as Joe Black; a person answering the telephone numbered 894-9195; and others as yet unknown.

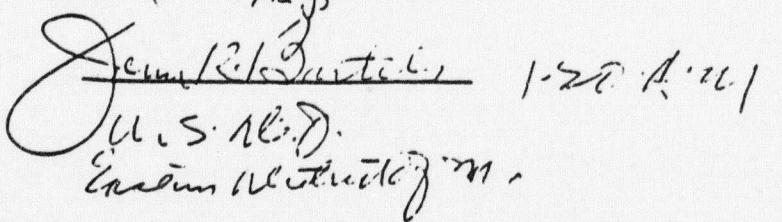
WHEREFORE, your affiant believes that probable cause exists to believe that James Vincent Napoli, Sr., also known as Jimmy Napp; James V. Napoli, Jr., also known as Jimmy, Jr. and Lefty; Michael DeLuca, also known as Mikey, Jr.; Robert Voulo, also known as Bobby and "the kid"; Diego Assaro, also known as Dicky; a male now known only as Ray; Richard Bascetta, also known as Shotgun; and others as yet unknown, each are engaged in the commission of offenses involving the operation of a gambling business in violation of Article 225, New York State Revised Penal Laws, that each is conducting, financing, managing, supervising, directing or owning, all or part of an illegal gambling business in violation of Section 1955 of Title 18, United States Code, and that each is conspiring to commit said federal

offenses in violation of Section 371 of Title 18, United States Code; that particular communications of the above named subjects, and others as yet unknown concerning these offenses will be intercepted; that normal investigative procedures reasonably appear unlikely to succeed if tried; and that there is probable cause to believe that particular communications of James Vincent Napoli, Sr., also known as Jimmy Napp; James V. Napoli, Jr., also known as Jimmy, Jr. and Lefty; Michael DeLuca, also known as Mikey, Jr.; Robert Voulo, also known as Bobby and "the kid"; Diego Assaro, also known as Dicky; a male now known only as Ray; Richard Bascetta, also known as Shotgun; and others as yet unknown concerning the above described offenses will be obtained through the continued interception of oral communications at the premises located at The Highway Lounge, 362 Metropolitan Avenue, Williamsburg, Brooklyn, New York.

On the basis of the allegations contained in this application and on the basis of the affidavit of Special Agent Charlie J. Parsons which is attached hereto and made a part hereof, applicant requests this Court to issue an Order pursuant to the power conferred on it by Section 2518 of Title 18, United States Code, authorizing the Federal Bureau of Investigation of the United States Department of Justice to continue to intercept oral communications at the above described premises until communications are intercepted which reveal the manner in which James V. Napoli, Sr., also known as Jimmy Napp; James V. Napoli, Jr., also known as Jimmy, Jr. and Lefty; Michael DeLuca, also known as Mikey, Jr.; Robert Voulo, also known as Bobby and "the kid"; Diego Assaro, also known as Dicky; a male now known only as Ray; Richard Bascetta, also known as Shotgun; and others as yet unknown, participate in this illegal gambling business, and which reveal the identities of their confederates, their places of operation, the nature of the conspiracy involved herein, or for a period of fifteen (15) days (excluding Sundays) from the date of this Order, whichever is earlier.

  
FRED F. BARLOW, SPECIAL ATTORNEY  
Department of Justice

Sworn to before me this  
2nd day of May, 1973.

  
James R. Bascetta, 1-28 A-761  
U.S. A.G.  
Encl. (Continued) M.

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16601  
UNITED STATES GOVERNMENT.

DEPARTMENT OF JUSTICE

# Memorandum

TO : Henry E. Petersen,  
Assistant Attorney General  
Criminal Division

DATE: MAY 3, 1973

FROM : The Attorney General

SUBJECT: Authorization for Interception Order Application

This is with regard to your recommendation that I authorize an application to a Federal judge of competent jurisdiction for an order under Title 18, United States Code, Section 2518, authorizing the continued interception of oral communications for a fifteen (15) day period at the premises located at the Highway Lounge, 362 Metropolitan Avenue, Williamsburg, Brooklyn, New York, in connection with the investigation into possible violations of Title 18, United States Code, Sections 1955, and 371, by James Vincent Napoli, Sr., aka Jimmy Napoli; James V. Napoli, Jr., aka Jimmy Jr. and Lefty; Michael DeLuca, aka Mikey Jr.; Robert Youlo, aka Bobby and "The Kid"; Diogo Assaro, aka Dicky, a male, now known only as Ray; Richard Bassett, aka Shotgun, and others as yet unknown.

Pursuant to the power conferred on me by Section 2516 of Title 18, United States Code, I hereby authorize the above-described application to be made by any investigative or law enforcement officer of the United States as defined in Section 2510(7) of Title 18, United States Code.

*RICHARD G. KLEINERST*

RICHARD G. KLEINERST  
Attorney General

5/2/73

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Washington 20530

MAY 3 1973

Mr. Denis E. Dillon  
Attorney in Charge  
Brooklyn Strike Force  
Brooklyn, New York

Dear Mr. Dillon:

This is to advise you that pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, the Attorney General has authorized an application to be made to a Federal judge of competent jurisdiction for an order under Section 2518 of Title 18, United States Code, authorizing the continued interception of oral communications for a fifteen (15) day period at the premises located at The Highway Lounge, 362 Metropolitan Avenue, Williamsburg, Brooklyn, New York, in connection with the investigation into possible violations of Title 18, United States Code, Sections 1955 and 371, by James Vincent Napoli, Sr., a/k/a Jimmy Napp; James V. Napoli, Jr., a/k/a Jinny, Jr., and Lefty; Michael DeLuca, a/k/a Mikey, Jr.; Robert Vquolo, a/k/a Bobby and "The Kid"; Diego Assaro, a/k/a Dicky; a male now known only as Kav; Richard Bascetta, a/k/a Shotgun; and others as yet unknown. The memorandum of authorization approved by the Attorney General is attached hereto.

Accordingly, you or any other attorney on your staff who is an investigative or law enforcement officer of the United States within the meaning of Section 2510(7) of Title 18, United States Code, are authorized to make the above-described application.

Sincerely,

*Henry W. Petersen*  
HENRY W. PETERSEN  
Assistant Attorney General

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

IN THE MATTER OF THE APPLICATION  
OF THE UNITED STATES FOR AN ORDER  
AUTHORIZING THE CONTINUED INTERCEPTION  
OF ORAL COMMUNICATION

AFFIDAVIT

STATE OF NEW YORK  
COUNTY OF KINGS  
EASTERN DISTRICT OF NEW YORK ss:

CHARLIE J. PARSONS, Special Agent, Federal Bureau of  
Investigation, New York, being duly sworn states:

I am an "investigative law enforcement officer..." of  
the United States within the meaning of Section 2510(7) of Title  
18, United States---that is, an officer of the United States who  
is empowered by law to conduct investigations of and to make arrests  
for offenses enumerated in Section 2516 of Title 18, United States  
Code.

I make this affidavit in support of an application which  
seeks authorization to continue to intercept oral communications  
concerning offenses involving violations of Title 18, United States  
Code, Section 1955, and a conspiracy to violate said statutes in  
violation of Title 18 United States Code, Section 371, which have  
been and are being committed by JAMES VINCENT NAPOLI, Sr., also known  
as Jimmy Napp; JAMES V. NAPOLI, Jr., also known as Jimmy Jr. and  
Lefty; MICHAEL DE LUCA, also known as Mikey Jr.; ROBERT VOULO, also  
known as Bobby and "The Kid"; DIEGO ASSAPO, also known as Dicky; a  
male now known only as Ray; RICHARD BASSETTA, also known as Shotgun;  
and others as yet unknown.

I have supervised the conduct of the investigation of this offense and, as a result of my personal participation in that investigation and of reports made to me by agents under my direction, I am familiar with all the circumstances of the offenses. On the basis of that familiarity, I allege the facts contained in the numbered paragraphs below to show that:

a. There is probable cause for belief that JAMES VINCENT NAPOLI, Sr., also known as Jimmy Napoli; JAMES V. NAPOLI, Jr., also known as Jimmy Jr. and Lefty; MICHAEL DE LUCA, also known as Mikey Jr.; ROBERT VOULO, also known as Bobby and "The Kid"; DIEGO ASSARO, also known as Dicky; a male now known only as Ray; RICHARD BASCETTA, also known as Shotgun; and others as yet unknown have committed, and are committing, will continue to commit and will continue to conspire to commit offenses involving the conducting, financing, managing, supervising, directing or owning of all or part of an illegal gambling business in violation of Article 225, Section 225.0 through 225.40, of the New York State Revised Penal Law, and also in violation of Sections 1955 and 371, of Title I<sup>o</sup>, United States Code.

b. There is probable cause for belief that communications concerning those offenses will be obtained through the continued interception of oral communications at the Highway Lounge, 367 Metropolitan Avenue, Brooklyn, New York.

c. Normal investigative procedures have been tried and reasonably appear unlikely to succeed if tried further.

No previous applications are known to have been made to any judge for authorization to intercept or for approval of interception of wire or oral communications involving any of the persons, facilities or places specified herein except the following:

On April 10, 1970, the Honorable ANTHONY AUGELLI, United States District Judge, District of New Jersey, signed an order authorizing the interception of wire communications of MARTIN CASELLA, HENRY RADZIEWICZ and others to and from the telephones numbered 201-659-9260 and 201-659-9877, located at Marty's Mile Square Tavern, 615 1st Street, Hoboken, New Jersey.

On May 18, 1970, the Honorable JACOB B. MISHLER, United States District Judge, Eastern District of New York, signed an order authorizing the interception of wire communications of JAMES V. NAPOLI, JAMES VINCENT (sic.) NAPOLI, Jr., and others to and from the telephone numbered 212-384-9615, located at the Highway Lounge, 362 Metropolitan Avenue, Brooklyn, New York; on the same date, the Honorable THOMAS F. CROAKE, United States District Judge for the Southern District of New York, signed an Order authorizing the interception of wire communications of JAMES VINCENT NAPOLI, JAMES VINCENT (sic) NAPOLI Jr. and others then unknown to and from the telephone numbered 212-889-7679, located at 216 East 31st Street, New York, New York (NAPOLI, Sr.'s residence).

On December 8, 1972, the Honorable OPPIN J. JUDIN, United States District Judge, Eastern District of New York, signed an Order authorizing the interception of oral communications of BARRY RUSSO, ANTHONY DI MATTEO also known as Tony Apples (referred to in the application as PASQUALE ROSETTI) and a male known only as JOHN DOE D, at Apartment 309, 8-15 27th Street, Astoria, Queens, New York.

On January 15, 1973, the Honorable JACK B. WEINSTEIN United States District Judge, Eastern District of New York, signed an Order authorizing the interception of oral communications of BARRY RUSSO, ANTHONY DI MATTEO, also known as Tony Apples, JOSEPH

SIMONELLI, also known as Joe Black, ROCCO RICCARDI, also known as Rocky, PHYLLIS ENGEFT and an individual referred to herein as JOHN DOE D at the above premises.

On February 20, 1973, the Honorable GEORGE ROSLING, United States District Judge, Eastern District of New York, signed an order authorizing the interception of wire communications to and from the telephones bearing numbers 212-932-2702, located at Apartment 309, 8-15 27th Avenue, Astoria, Queens, New York, and 212-835-1163, located at 161-20 91st Street, Howard Beach, Queens, New York, in connection with the investigation into possible violations of Title 18, United States Code, Sections 1955 and 371 by JAMES NAPOLI, Jr. also known as Lefty; BARI MASCITTI; ANTHONY DI MATTEO also known as Tony Apples; EUGENE SCAFIDI also known as Bo; ROCCO RICCARDI also known as Rocky; ROBERT VOULO; JOSEPH SIMONELLI, also known as Joe Black; a person answering the telephone numbered 894-9195; and others as yet unknown.

On April 12, 1973, the Honorable JOHN P. BARTELS, United States District Judge, Eastern District of New York, signed an Order authorizing the interception of oral communications at the premises of The Highway Lounge, 362 Metropolitan Avenue, Williamsburg, Brooklyn, New York, in connection with the investigation into possible violations of Title 18, United States Code, Sections 1955 and 371 by JAMES VINCENT NAPOLI, Sr.; also known as Jimmy Napp; JAMES NAPOLI, Jr., also known as Jimmy Jr. and Lefty; MARTIN CASELLA, also known as Motts; ANTHONY DI MATTEO, also known as Tony Apples; MICHAEL DE LUCA, also known as Mikey, Jr.; RICHARD RASCETTA, also known as Shotgun; and others.

The facts alleged in the May 1<sup>st</sup>, 1970, affidavit of Special Agent WILLIAM J. CANALEZ and in my affidavits dated May 1, December 9 and 20, 1972, January 15, 1973, January 18, 1973, February 20, 1973 and April 12, 1973, are incorporated herein by

this reference and copies of the said affidavits are annexed as Exhibits A, B, C, D, E, F, G and H.

FACTS SHOWING PROBABLE CAUSE  
AND NEED FOR INTERCEPTION

1. Hereafter, unless specified otherwise, all telephone numbers are in the (212) area, and all addresses are streets in Brooklyn, New York. Also, all excerpted conversations are summaries, and are not to be construed as exact.

2. The facts contained herein, and in the incorporated affidavits, Exhibits A-H, have resulted from an investigation of the alleged JAMES V. "Jimmy Napp" NAPOLI gambling operation, which investigation has been in progress for over two years, in an attempt to gain sufficient prosecutable evidence against the uppermost members of this operation and their co-conspirators.

This affidavit's facts are based primarily on visual and electronic surveillance and the persons identified as being in, entering and exiting The Highway Lounge during the period referred to in this affidavit, are reflections only of partial surveillance and other persons apparently unidentified may have been identified by other surveilling agents in the area.

3. Pursuant to Judge BARTELS' order of April 12, 1973, electronic monitoring devices were installed on April 13, 1973, in the subject premises, The Highway Lounge, 362 Metropolitan Avenue, Williamsburg, Brooklyn, New York. Due to interference from two television sets and a jukebox with the subject premises, and technical difficulties with the location and operation of the monitoring devices, intercepted conversations sufficiently clear to identify all those conversing, or to be persuasive prosecutable evidence, were not recorded until April 23, 1973. However, even before this date, conversations were overheard by monitoring agents, which were sufficiently clear to be summarized, although not verbatim. The following paragraphs reflect gambling conversations intercepted during the period April 13, 1973, through April 26, 1973:

4. On April 17, 1973, intermittent monitoring of the subject premises was conducted from approximately 1:17 pm to 7:00 pm. During this interception, many of the conversations were inaudible, for the reasons given above. However, during the interception of wire communications of a different, bookmaking operation pursuant to Judge BARTELS' order of April 13, 1973, in another Federal Bureau of Investigation investigation, DIEGO ASSARO, also known as Dickie, was overheard discussing a raid by New York City Police officers on his bookmaking operation, on information furnished by Special Agent RICHARD A. NALLEY to Sergeant AL WILSON. After discussing and telling various persons with whom he was conversing the new number to be used for betting in his operation, he stated to "Davy" (probably DAVID TRECCAGNOLI), just before terminating the conversation, that he "had to go see the guy at the 'Highway'." Shortly after this conversation ended, DIEGO ASSARO was observed by Special Agents of the Federal Bureau of Investigation entering the subject premises, The Highway Lounge, 362 Metropolitan Avenue. Unfortunately, due to the difficulties referred to above, no conversation with JAMES V. NAPOLI, Sr., who had been observed entering The Highway Lounge prior to him, was intercepted in a manner sufficiently clear to record or to positively identify ASSARO's voice, although the monitoring agents overheard the following summarized conversation. At about 3:09 pm, someone asked, "how did they get in?" This was answered, "they broke down the door". At about 5:45 pm, the booking of ALLIE NOCE (ASSARO's partner) was discussed, and NAPOLI Sr. said that ASSARO, he should come to see me for his protection. At approximately 5:56 pm, someone said, I'll call HAPPY myself. Bail is \$5,000.00. At about 6:03 pm, someone asked, what kind of number is ALLIE? This

was answered by " - 0665". Immediately thereafter, someone referred to the 86th Precinct.

5. Affiant has learned from Special Agent RICHARD A. NALLEY, affiant for Judge BARTFELD'S order of April 13, 1973, and the agent in charge of the investigation of which that authorized interception is a part, that the premises raided by the New York City Police Department on April 17, 1973, were located at 63-61 99th Street, Apartment 1-A, Queens, New York, and that one of the two telephones in these premises was the instrument numbered 212-897-0665.

6. On April 18, 1973, monitoring of the subject premises was conducted from approximately 1:30 pm to 6:30 pm. JAMES V. NAPOLI, Sr., RICHARD BASSETTA, ANTHONY DI MATTEO, ARTHUR CATENACCI, JAMES NAPOLI, Jr., MICHAEL DE LUCA and ROBERT VOULO, were all observed entering or exiting The Highway Lounge during this time. A conversation between NAPOLI, Sr., DE LUCA and VOULO, lasting approximately 45 minutes, was monitored, although again the recording was not sufficiently clear to be persuasive evidence. During this conversation, VOULO was questioned regarding his not paying various employees on time, to which he answered, among other things, that BARI (MASCITTI) picked up the money on Wednesdays. MICHAEL DE LUCA noted during the conversation that VOULO's "leg" of the gambling operation had been going downhill since the death of BUDDY GRIFFIN (who was killed in a motorcycle accident on or about July 7, 1972). This conversation was replete with references to large sums of money, including daily and weekly amounts. VOULO was given specific instructions as to the new procedures he was to follow in the future in conducting his part of the operation.

7. During the afternoon of April 19, 1973, ANTHONY DI MATTEO, RICHARD BASSETTA, SALVATORE VIGORITO, JOHN LOTIERZO, also known as "Mixed up Jr.", EUGENE CATENACCI, PETER F. GUIDO, ROBERT VOULO, JAMES NAPOLI, Jr., ARTHUR CATENACCI, BARI MASCITTI,

and others, were observed entering and exiting The Highway Lounge, most of the above persons not exiting The Highway Lounge until JAMES NAPOLI, Sr. entered. The day before, NAPOLI had been intercepted in a short conversation saying that he wanted to "see everyone" the next day. During this afternoon, little if any comprehensible conversation was intercepted. However, at about 2:17 pm, ROSIE (the barmaid) and RICHIE (BASCETTA) mentioned NAPP. At about 3:09 pm, RICHIE mentioned getting paid. At about 5:51 pm, SAL (VIGORITO) mentioned "349".

8. During the period of interception April 20, 1973, from approximately 2:30 pm through 6:00 pm, the following persons, among others, were observed in, exiting or entering The Highway Lounge: SALVATORE VIGORITO, TOMMY ZITO, JAMES NAPOLI, Jr., JOHN LOTIERZO, ROBERT MANSE also known as Big Bobby, PASQUALE DISIBIO, JOHN GARCIA also known as Biggie, RICHARD BASCETTA and JAMES NAPOLI, Sr. At about 4:02 pm, someone was overheard saying "Shotgun's here". At about 4:05 pm, an unidentified male asked, "why don't you put yourself on the payroll?" At about 4:52 pm, two unidentified males discussed money and business.

9. After the location and operation of the monitoring devices were changed, surveillance was again instituted on the afternoon of April 21, 1973. However, this day, for the only time during the period of monitoring and surveillance reflected in this affidavit, NAPOLI, Sr. was not at The Highway Lounge during the afternoon. Because of his absence, and the location of the monitoring devices, minimal conversations were monitored on April 21, 1973. However, among other persons, the following were observed entering, exiting, or inside The Highway Lounge: PASQUALE DISIBIO, JOHN LOTIERZO, SALVATORE VIGORITO, RAY NAPOLITANO, RICHARD BASCETTA, FRED VIGORITO, ROBERT VIGORITO (SALVATORE's son), CARMINE ROSETTI,

ROBERT MANSE, ERNEST PUPOLA, ALFRED BASSETTA (RICHARD's brother), ANTHONY ZITO, DAVID TRECCAGNOLI (who has been monitored and recorded discussing gambling matter with DIEGO ASSARO, also known as Dickie, during the period of authorized surveillance pursuant to Judge BARTELS' order of April 13, 1973).

10. No monitoring was conducted on April 22, 1973, pursuant to Judge BARTELS' order of April 12, 1973, which specifically excludes Sundays from the monitoring period, based on affiant's investigation which has shown The Highway Lounge not to be utilized on Sundays as a "meeting place".

11. On April 23, 1973, monitoring was again conducted of the subject premises during the afternoon, from approximately 1:35 pm through 6:35 pm. During this period of monitoring, the following persons were observed entering, exiting, or inside The Highway Lounge: JAMES NAPOLI, Sr., ROBERT MANSE, PASQUALE DISIBIO, SAMUEL GINSBERG, RICHARD BASSETTA, JAMES NAPOLI, Jr., and VINCENT CASESE, also known as Lefty.

At about 4:20 pm, a male known now only as Ray, of probable Puerto Rican descent, conversed with NAPOLI, Sr., saying that he was doing \$18,900 a week. NAPOLI said that if he needed money to work, let me know, and also asked Ray when he was going to Puerto Rico. NAPOLI also said later, that everybody from Puerto Rico knows how to run numbers, "Chino", "Pedro", "Jr." were mentioned (the above three persons have been identified, either through surveillance, or gambling records seized previously in this investigation, as controllers in NAPOLI's operation). At about 4:42 pm, EUGENE (probably CATENACCI) was mentioned by NAPOLI, saying that he "banks it" and gives it to RICHIE (BASSETTA). The duplicate of this sheet. How do you expect me to pay you? Several minutes later, NAPOLI stated that the work wasn't there. Who handles it? NAPOLI also said later, the duplicate of this sheet - if it's not

here, how do you expect to pay it...RICHIE. (Apparently calling to RICHARD BASSETTA). NAPOLI also told BASSETTA, in connection with a policy numbers "hit" (or win) the validity of which was being questioned, to go back through the duplicates for three months, (referring to the duplicate "ribbons" or adding machine tapes), and give it to the "detective". Other conversations monitored during that afternoon were: NAPOLI, Sr. telling someone to go into the bar and take that business personally from EUGENE (probably referring to CATTANACCI). Also, referring to other apparent mistakes on verifying hits, someone noted that this had happened on several occasions, saying, the books were there. The duplicates I had in the office. New York combination (referring to the "New York number").

13. On April 24, 1973, the following persons, among others, were observed entering, exiting or inside The Highway Lounge: SALVATORE VIGORITO, MAURICE LICHTMAN, also known as Mersh, ARTHUR CATENACCI, ROBERT VIGORITO, PASQUALE DISIBIO, SAMUEL GINSBERG, JERRY D'AVANZO, DAVID TRECCAGNOLI, JAMES NAPOLI, Jr., JAMES NAPOLI, Sr., VINCENT CASESE, ROBERT MANSE, RICHARD BASSETTA, ALLIE NOCE (the person who was arrested in the wireroom raided by the New York City Police Department on April 17, 1973) and RICHARD BASSETTA. During this afternoon, a lengthy conversation between NAPOLI, Sr., ALLIE NOCE, and DAVID TRECCAGNOLI ensued, with NAPOLI questioning the other two about money owed, for outstanding claims, and NAPOLI saying that he was not going to "bail them out again".

14. On April 25, 1973, monitoring was conducted between approximately 2:15 pm and 5:06 pm. During this time, the following persons, among others, were observed entering, inside or exiting The Highway Lounge: SALVATORE VIGORITO, JOHN LOTIFERZO, ROBERT MANSE, PASQUALE DISIBIO, ROBERT VIGORITO, JAMES NAPOLI, Jr., JAMES NAPOLI, Sr., RICHARD BASSETTA, and the barmaid ROSIE. At about

3:20 pm, Napoli, Sr. was overheard calling Rose and asking her to send "Big Bob" (Manse) back. Later, an unknown male said that he wanted to know the figures.

15. On April 26, 1973, monitoring was continued during the afternoon, and the following persons, among others, were observed entering, exiting or inside the Highway Lounge: James Napoli, Sr., James Napoli, Jr., Robert Manse, Anthony Abbatemarco, also known as "Tony Shots", Richard Bascetta, Salvatore Vigorito, and Samuel Ginsberg. Napoli, Sr. and Abbatemarco discussed "setting up" in Queens and the Bronx, projecting that within a month they might have two or three books. They agreed to meet again next Thursday, May 3, 1973, at the Highway Lounge, and agreed that one more meeting "will do it." Napoli was also heard talking with an unidentified male, concerning amounts of money, such as "\$15,575, \$24,562, and \$17,000". It appeared from the content and collateral sounds of this conversation that Napoli and the male with whom he was conversing had papers in front of them. Later, Napoli said that he had told "them" years ago that horse business was out of style, and that sports betting would be "it". In another conversation, "Frankie" was mentioned as being in charge of an office having a problem. Also overheard discussed during the afternoon was the license plate of one of the surveilling Federal Bureau of Investigation vehicles.

15A. On April 30, 1973, among other conversations intercepted relating to gambling matters, Salvatore Vigorito, James Napoli, Jr. and an unknown male were intercepted in a conversation relating to a "hit" (policy win). Vigorito became very upset and advised the unknown male that he never came around unless he needed money to pay off his "hits." Napoli, Jr. then instructed Vigorito to give the unknown male "2 G's." Vigorito departed the premises, walked directly across the street to a building, returned a few minutes later, and apparently gave the unknown male the money. Prior to this conversation, Napoli, Jr. had been intercepted in several gambling conversations during April 13-28, 1973, which were not of sufficient clarity to be persuasive evidence.

16. For the reasons set forth in paragraphs 1-15, and in my incorporated affidavits, all normal avenues of investigation and prosecution have been exhausted, or have been considered too risky to attempt. The only remaining reasonable and feasible investigative procedure which can furnish the required quantum of evidence sufficient to prove beyond a reasonable doubt that James Vincent Napoli, Sr., also known as Jimmy Napoli; James V. Napoli, Jr.

also known as Jimmy, Jr. and Lefty; MICHAEL DE LUCA, also known as Mikey Jr.; ROBERT VOULO, also known as Bobby and "The Kid"; DIEGO ASSARO, also known as Dicky; a male now known only as Ray; RICHARD BASSETTA, also known as Shotgun; and others as yet unknown are conducting, financing, managing, supervising, directing or owning all or part of an illegal gambling business in violation of Title 18, United States Code, Section 1955, and a conspiracy to commit such acts, in violation of Title 18, United States Code, Section 371, is to continue to intercept oral communications of the above persons at the Highway Lounge, located at 362 Metropolitan Avenue, Williamsburg, Brooklyn, New York.

17. Inasmuch as the gambling operation described herein is apparently a continuing criminal conspiracy, the evidence sought through the continued interception of oral communications at the subject premises is expected to be obtained on a continuing basis on several days succeeding the first receipt of the communications which are the objective of this application. Therefore, it is requested that these interceptions not terminate when the sought communications are first obtained, but continue until interception reveals the identities of the confederates of JAMES VINCENT NAPOLI, Sr., also known as Jimmy Napp; JAMES V. NAPOLI, Jr., also known as Jimmy, Jr. and Lefty; MICHAEL DE LUCA, also known as Mikey Jr.; ROBERT VOULO, also known as Bobby and "The Kid"; DIEGO ASSARO, also known as Dicky; a male now known only as Ray; RICHARD BASSETTA, also known as Shotgun; and others as yet unknown, their other places of operation, and the nature of the conspiracy involved therein, are for a period of fifteen (15) days, excluding Sundays (the day on which these premises are not utilized in this operation) from the date of the order, whichever is earlier.

Wherefore, I submit that the information supplied by Exhibits A-H incorporated herein, surveillances, communications which

have previously been intercepted and informant information prove sufficient facts to establish probable cause that JAMES VINCENT NAPOLI, Sr., also known as Jimmy Napp; JAMES V. NAPOLI, Jr., also known as Jimmy Jr. and Lefty; MICHAEL DE LUCA, also known as Mikey Jr.; ROBERT VOULO, also known as Bobby and "The Kid"; DIEGO ASSARO, also known as DICKY; a male now known only as Ray; RICHARD BASSETTA, also known as Sheequn; and others as yet unknown have been and are now committing offenses involving the conducting, financing, managing, supervising, directing or owning all or part of an illegal gambling business in violation of Section 225.0 through 225.40 of the New York Penal Law and also in violation of Section 371 and 1955 of Title 18, United States Code.

Section 803 of Title 18, entitled, "Syndicated Gambling" of the Organized Crime Control Act of 1970, Public Law 91-452, 91st Congress, approved October 15, 1970, amended Chapter 95, Title 18, United States Code, by adding a new section, section 1955, Prohibition of Illegal Gambling Businesses. Section 801 of Title VIII of the Act contains special finding that illegal gambling involves widespread use of and has an effect upon interstate commerce and the facilities thereof.

Charlie J. Parsons  
CHARLIE J. PARSONS

Subscribed to and sworn to  
before me this 21 day  
of May, 1973..

James R. Bunting 1020 P.M.  
Jul. 5. 1973.  
FBI - NEW YORK

DEMAND FOR PARTICULARS

With Respect to Count One

A. With Respect to Paragraph I:

1. Quote each provision of 18 U.S.C. § 1961 (4) upon which the indictment alleges that the defendants named therein and other persons constituted an "enterprise".
2. In the event that it is contended the "enterprise" is a "group of individuals associated in fact although not a legal entity", set forth in complete detail the precise nature of, or manner in which such persons are "associated in fact".
3. Set forth the name and address of each of the "other persons" allegedly constituting the "enterprise" in addition to the defendants.
4. Set forth in full the exact role of each of the persons allegedly constituting the "enterprise".
5. State the date upon which the "enterprise" came into being.
6. State whether the "enterprise" still exists and, if not, the date when it ceased to exist.
7. Set forth for each of the persons constituting the "enterprise":
  - a. The date when such person became a member of or participant in the "enterprise";

13. State whether said "business" had a gross revenue of \$2,000 or more on more than one day.

14. If the answer the preceding item is in the affirmative:

- a. enumerate each such day;
- b. state the amount of gross revenue for such day; and
- c. describe the manner in which the gross revenue was ascertained.

15. State whether there was only one "business".

16. If the answer to item 15 is in the affirmative set forth:

- a. each date upon which such "business" operated;
- b. each place in which such "business" operated;
- c. the name and address of each person involved in such business; and for each such person describe in full the nature of his role or activity, if any, in the
  - i. conduct,
  - ii. financing,
  - iii. management,
  - iv. supervision,
  - v. direction; and/or
  - vi. ownershipof the "business";

- d. the number of persons involved in the conduct, financing, management, supervision, direction and/or ownership of said "business"; and
- e. a complete description of the nature of the "business" and its method of operation.

17. If the answer to item 15 is in the negative, state the number of such businesses and for each set forth:

- a. each date upon which such "business" operated;
- b. each place in which such "business" operated;
- c. the name and address of each person involved in such business; and for each such person describe in full the nature of his role or activity, if any, in the

- i. conduct,
- ii. financing,
- iii. management,
- iv. supervision,
- v. direction; and/or
- vi. ownership

of the "business";

- d. the number of persons involved in the conduct, financing, management, supervision, direction and/or ownership of said "business"; and
- e. a complete description of the nature of the "business" and its method of operation.

18. State whether the "enterprise" is the same as the "business".

19. If the answer to item 18 is in the negative, enumerate and describe each difference between the "enterprise" and the "business".

20. If different from item 11, enumerate each statute allegedly violated by the "business" alleged.

21. If different from item 12, quote the specific provisions of each statute enumerated in response to item 20 allegedly violated by the "business" alleged.

C. With Respect to Paragraph III:

22. State whether there is any difference between being "employed by ... the said enterprise" and "constitut[ing] an enterprise within the meaning of Title 18, United States Code, Section 1961 (4)".

23. If the answer to item 22 is in the affirmative, describe in full each difference.

24. State whether is any difference between being "associated with ... the said enterprise" and "constitut[ing] an enterprise within the meaning of Title 18, United States Code, Section 1961 (4)".

25. If the answer to item 24 is in the affirmative, describe in full each difference.

26. Set forth for each person enumerated in Paragraph III,

- a. the exact nature of his employment by the "enterprise";

- b. the exact nature of his association with the "enterprise";
- c. the dates of such person's employment;
- d. the dates of such person's association;
- e. a complete description of such person's conduct and/or participation in the conduct of the enterprise's affairs;
- f. whether such person's conduct and/or participation was direct or indirect.

27. Enumerate each statute defining "racketeering activity" which is applicable.

28. Quote each provision of each statute enumerated in response to item 27, which the government contends is relevant.

29. Enumerate each statute defining "unlawful debts" which is applicable.

30. Quote each provision of each statute enumerated in response to item 29, which the government contends is relevant.

31. Enumerate each statute defining "pattern of racketeering activity" which is applicable.

32. Quote each provision of each statute enumerated in response to item 31 which the government contends is relevant.

39. Set forth in complete detail by defendant the manner in which each such defendant "advanced ... gambling activity".

40. Set forth in complete detail by defendant the manner in which each such defendant "profited from unlawful gambling activity", including, without limitation, the amount of profit realized and the method of computation thereof.

41. State whether the "enterprise" referred to in Paragraph III.A.2. is the same as the "enterprise" referred to in Paragraph I.

42. If the answer to item 41 is in the negative, describe each difference.

43. Set forth by defendant:

a. the amount of money received;

b. the precise nature of the "records";

c. the date and time of each such receipt of money and/or records;

d. the name and address of each person giving the said money or records;

e. the name and address of each person present at such delivery.

With Respect to Paragraph III.B.:

44. Enumerate each statute allegedly violated.

45. Quote the provisions of each statute enumerated in response to item 44 allegedly violated.

46. Enumerate each statute allegedly rendering the alleged "debts" "unlawful".

47. Quote the provisions of each statute enumerated in response to item 46 allegedly rendering said debts unlawful.

48. For each "collection of an unlawful debt" set forth:

- a. the date and time thereof;
- b. the place thereof;
- c. the name and address of each person making such collection;
- d. the name and address of each person making payment thereof.
- e. the name and address of each other person present at the time of such collection;
- f. the name and address of each person aiding and abetting, as defined in 18 U.S.C. § 2, in the making of such collection and a complete description of each such person's conduct in connection with such collection.
- g. the amount thereof; and

- i. his name and address;
- ii. the date and time and place he joined;
- iii. the name and address of each person present when he joined;
- h. state whether it will be claimed that the alleged agreement was oral or written or partly oral and partly written.
- i. set forth in full any written portions of the alleged agreement and annex a true copy thereof to a bill.
- j. set forth the substance of any oral portion of the alleged agreement and what was said by each person involved.

52. If it will be claimed that there was more than one agreement, or that the agreement(s) was amended, modified or changed set forth separately for each such agreement and amendment, modification and change all of the particulars demanded in the preceding item.

B. With Respect to Paragraphs III and IV:

53. With respect to the "enterprise" set forth each particular demanded in items 1, 2, 4, 5, 6 and 7. Note: if full and complete the answers may be incorporated by reference.

54. With respect to the enterprise's engaging in interstate commerce, set forth each particular demanded in item 8.

- iii. supervision,
- iv. direction,
- v. financing, and/or
- vi. ownership of

"such business", including a complete description of each such act.

77. Enumerate each date on which "such business" had gross revenue of at least \$2,000, and for each such date:

- a. state the amount of gross revenue, and
- b. describe completely the method by which such amount was computed.

78. Enumerate each day on which "such business" operated, setting forth for each such day:

- a. each place of operation;
- b. the name of each person involved in such operation and a complete description of each act in such operation; and
- c. a complete description of the nature of the operation of "such business".

79. Enumerate each statute allegedly violated by "such business".

80. Quote the provisions of each statute enumerated in response to the preceding item allegedly violated by "such business".

81. Enumerate each person who it will be contended was a principal in "such business".

82. Enumerate each person who it will be contended was an aider and abettor in "such business".

83. State each type of "gambling" activity in which it will be contended "such business" was engaged.

WITH RESPECT TO COUNT FOUR

84. Furnish each of the particulars demanded with respect to Count Three.

WITH RESPECT TO COUNT FIVE

85. Furnish each of the particulars demanded with respect to Count Three.

WITH RESPECT TO COUNT SIX

86. For each interstate trip, set forth:

- a. the date, time and place of departure;
- b. the date, time and place of arrival;
- c. the route thereof;
- d. the name and address of each person present during all or part thereof;
- e. location of each place in which any person involved in the crime alleged boarded and/or exited from the vehicle(s) used;

- f. identify by make, year, color, body type, registration number, vehicle identification number and/or owner, each vehicle used;
- g. enumerate each statute allegedly violated during the course thereof; and
- h. quote the relevant provisions of each statute enumerated in response to item 86(g).

87. Describe in full the nature and type of the alleged "gambling".

88. If the "enterprise" referred to in Count Six is different from either the "enterprise" referred to in paragraph I of Count One or the "enterprise" referred to in paragraph III.A.2 of Count One, set forth and describe fully each such difference.

89. Enumerate each statute defining "profits" as the term is used in Count Six and quote the provisions of each such statute which the government contends are relevant to Count Six.

90. Set forth the amount of "profits" defendants intended to distribute.

91. Describe in full the manner in which such "profits" were computed.

92. State whether any "profits" were distributed.

93. If the answer to the preceding item is in the affirmative, set forth for each such distribution:

95. If the response to any portion of the preceding item is in the affirmative, set forth separately for each such affirmative response:

- a. the date thereof,
- b. each person involved therein, including a complete description of the conduct upon which the affirmative response is predicated, and
- c. each place in which such act occurred or was intended to occur.

96. Enumerate each of the defendants who it is, or will be contended acted as a principal.

97. Enumerate each of the defendants who it is, or will be contended aided and abetted, as defined by 18 U.S.C. §2, describing in full each act performed by him.

98. Set forth the name and address of each person, if any, who it is, or will be contended acted in concert with one or more of the defendants.

99. Describe in full for each person named in response to the preceding item the nature of his role and activities.

WITH RESPECT TO COUNT SEVEN

100. Set forth the name and address of each person, other than Richard Bascetta, whom it will be contended the defendants, or either of them, "endeavored to obstruct, delay and [/or] prevent from communicating any information relating to a violation of" 18 U.S.C. §1955.

101. Set forth separately for each person it is alleged the defendants, or either of them, intimidated or attempted to intimidate:

OK a. the date and time of each such act or attempted act;

OK b. the place that each such act or attempted act took place;

c. the name and address of each person present at the time such act or attempted act took place;

ND d. describe the role, if any, of each person enumerated in response to the previous sub-item; and

e. a complete description of the conduct (including the words and/or gestures used) for each such act.

102. Set forth separately for each person it is alleged the defendants, or either of them, used or attempted to use "threats of force":

OT a. the date and time of each such act or attempted act;

OK b. the place that each such act or attempted act took place;

c. the name and address of each person present at the time such act or attempted act took place;

ND d. describe the role, if any, of each person enumerated in response to the previous sub-item; and

e. a complete description of the conduct (including the words and/or gestures used) for each such act.

103. Set forth the name and address of each "other Special Agent of the Federal Bureau of Investigation".

104. Set forth, for each "Special Agent" "then conducting and engaging in ... an investigation", each provision of law and each directive, order or instruction upon which it will be contended that "he was duly authorized".

105. State which of the defendants aided and abetted, as defined in 18 U.S.C. §2, describing in full the conduct it will be contended constituted the aiding or abetting.

WITH RESPECT TO COUNT EIGHT

A. With Respect to Paragraph I:

106. Set forth the name and address of each unnamed conspirator described as "known ... to the Grand Jury".

107. Set forth the name and address of each unnamed conspirator described as "unknown to the Grand Jury", whose identity is or becomes known to the Government.

108. With respect to the agreement:

a. state the date, time and place it was entered into;

b. state the name and address of each person present at the time made;

109. If it will be claimed that there was more than one agreement, or that the agreement(s) was amended, modified or changed set forth separately for each such agreement and amendment, modification and change all of the particulars demanded in the preceding item.

110. State whether the conspiracy charged in Count Eight is the same conspiracy as that charged in Count Two.

111. If the answer to the preceding item is in the negative, set forth in full each difference between the two.

112. Enumerate each statute which would be violated by the alleged "illegal gambling business".

113. Quote the specific provisions of each statute enumerated in response to the preceding item allegedly violated by the alleged "illegal gambling business".

114. If it will be contended that the defendants, or any of them, in connection with said conspiracy actually conducted, financed, manage, supervised, directed and/or owned all or part of an illegal gambling business or businesses set forth all of the particulars demanded in items 13, 14, 15, 16 and 17.

Note: if the answers to such items are full and complete they may be incorporated by reference.

115. State whether it will be contended that the defendants or any of them or any of their co-conspirators, agents or employees actually traveled in interstate commerce with intent to distribute the profits of and/or to promote, manage, establish, carry on, facilitate the promotion, management, establish-

ment and/or carrying on of an unlawful activity in connection with the conspiracy, and if so set forth each of the particulars demanded by the items set forth with respect to Count Six.

Note: If the answers to such items are full and complete they may be incorporated by reference.

B. With Respect to Paragraph II.

116. Furnish all of the particulars demanded in respect to Paragraphs IV, V and VI of Count Two. Note: If the answers to such items are full and complete with respect to Count Eight they may be incorporated by reference.

C. With Respect to Paragraph III:

117. With respect to subparagraph A:

- a. set forth the date, place and time such records were possessed;
- b. describe in full each such record;
- c. state whether it will be contended that said defendants knew the nature and contents of said records at the time of their possession thereof;
- d. state in full the manner in which such act:
  - i. furthered the conspiracy and/or
  - ii. effected the purpose of the conspiracy;
- e. set forth the name and address of each other person present, if any, at the time of such possession by said defendants.

118. With respect to subparagraph B:

- a. set forth the date, time and place of such meeting;
- b. set forth the name and address of each person present thereat;
- c. set forth the substance of any conversation taking place at such meeting;
- d. set forth the name and address of each other person present thereat;
- e. state in full the manner in which such meeting:
  - i. furthered the conspiracy; and/or
  - ii. effected the purpose of the conspiracy.

119. With respect to subparagraph C:

- a. set forth the date, time and place of such meeting;
- b. set forth the name and address of each person present thereat;
- c. set forth the substance of any conversation taking place at such meeting;
- d. set forth the name and address of each other person present thereat;
- e. state in full the manner in which such meeting:

- i. furthered the conspiracy; and/or
- ii. effected the purpose of the conspiracy.

120. With respect to subparagraph D:

- a. set forth the date, time and place of such meeting;
- b. set forth the name and address of each person present thereat;
- c. set forth the substance of any conversation taking place at such meeting;
- d. set forth the name and address of each other person present thereat;
- e. state in full the manner in which such meeting:
  - i. furthered the conspiracy; and/or
  - ii. effected the purpose of the conspiracy.

121. With respect to subparagraph E:

- a. set forth the date, place and time such records were possessed;
- b. describe in full each such record;
- c. state whether it will be contended that said defendants knew the nature and contents of said records at the time of their possession thereof;

d. state in full the manner in which such act:

- i. furthered the conspiracy and/or
- ii. effected the purpose of the conspiracy;

e. set forth the name and address of each other person present, if any, at the time of such possession by said defendants.

122. With respect to subparagraph F:

- a. set forth the date, place and time such records were possessed;
- b. describe in full each such record;
- c. state whether it will be contended that said defendants knew the nature and contents of said records at the time of their possession thereof;
- d. state in full the manner in which such act:

- i. furthered the conspiracy and/or
- ii. effected the purpose of the conspiracy;

e. set forth the name and address of each other person present, if any, at the time of such possession by said defendants.

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----X

UNITED STATES OF AMERICA

75 CR 341

-v-

FRANK ALTESE, ET AL

DEFENDANTS

-----X

GOVERNMENT'S BILL OF PARTICULARS

The United States, by Fred F. Barlow, Special Attorney, Department of Justice, submits the following particulars, with the numbering keyed (in parentheses) to the demands of James V. Napoli, Sr.

COUNT ONE

1. (1) The Government contends that the enterprise alleged in paragraph I is a group of individuals associated in fact although not a legal entity."

2. (14) The Government contends that the illegal gambling business had gross revenues of \$2,000 or more on the following dates: December 22, 1969 - February 22, 1971, June 7, 1971 - June 15, 1971, December 1, 1971 - July 15, 1972, August 28, 1972 - September 4, 1972, December 3, 1972 - December 8, 1972, January 15, 1973 - January 20, 1973, May 7, 1973 - May 12, 1973, June 21, 1974, March 10, 1975 - March 22, 1975; excepting Sundays.

3. (18) Yes, except for definitional differences.

4. (19) Definitional differences.

5. (22) Yes.

6. (23) Definitional differences.

7. (24) Yes.

8. (25) Definitional differences.

9. (31) Title 18, United States Code, Section 1961 (5) provides the minimal definition.

10. (41) No.

DISCOVERY  
SUBFILE

fd 12/15/75

67

11. (42) Definitional differences.
12. (14) New York State Revised Penal Law, §§ 225.10 and 225.20, and statutes quoted in III B. of Count One.
13. (45) Attached as exhibits are the statutory provisions.
14. (46) Title 18, United States Code, Section 1961 (6) (B), and statutes referred to in answer 12.
15. (47) Attached as an exhibit is the language of § 1961 (6) (B).

COUNT TWO

16. (48) Title 18, United States Code, Section 1961 (4): "any individual, partnership, corporation, association, or other legal entity, and any . . . group of individuals associated in fact although not a legal entity."

COUNT THREE

17. (77): March 1, 1972 - July 7, 1972, excepting Sundays.
18. (78): March 1, 1972 - July 7, 1972.
19. (79): New York State Revised Penal Law, §§ 225.10 and 225.20.
20. (80): Attached as exhibits.
21. (81-82) All defendants named as principals and not as aiders or abettors.
22. (83) Policy, numbers.

COUNT FOUR

23. (84) \$2,000, January 15, 1973 - January 20, 1973; operation December 13, 1972 - March 9, 1973; §§ 225.10 and 225.20, all principals; policy, numbers.

COUNT FIVE

24. (85) \$2,000, May 7 - May 12, 1973; operation, April 13 - June 15, 1973, excepting Sundays; §§ 225.10 and 225.20; all defendants named as principals except Radziewicz, who is named as an aider and abettor; policy, numbers.

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COUNT SIX

25. (87) Policy, numbers.
26. (88) Definitional. Title 18, United States Code, Section 1952 attached as exhibit. See answers 1 and 3.
27. (89) Proceeds defined in § 1952 - see exhibit
28. (96-97) All defendants named as principals except Napoli, named as an aider and abettor.

COUNT SEVEN

29. (100) Ernest Pupola, Robert Liesegang.
30. (101) Richard Bascetta: a. May 14, 1973, afternoon; b. 362 Metropolitan Avenue, Brooklyn. Ernest Pupola: a. about May 12, 1973; b. unknown. Robert Liesegang: a. September 13, 1973, evening; b. 77-03 Eliot Avenue, Queens.
31. (102) Robert Liesegang: a. September 13, 1973, evening; b. 77-03 Eliot Avenue, Queens.
32. (103) Vernon Swint, F.B.I., San Juan, Puerto Rico; James F. Mitchell, F.B.I., Norfolk, Virginia; Charles Queener, F.B.I., Jacksonville, Florida.
33. (105) Both defendants are named as principals.

COUNT EIGHT

34. (110) Yes, except for definitional differences in crimes.
35. (111) Different as to elements of the criminal objects of the conspiracies.
36. (113) Attached as exhibits.
37. (115) Yes. Answers re Count Six are incorporated by reference.
38. (117) A. 967 East 2nd Street, Brooklyn; evening.
39. (118) B. 362 Metropolitan Avenue, Brooklyn; afternoon.
40. (119) C. 362 Metropolitan Avenue, Brooklyn; afternoon.

41. (120) D. 362 Metropolitan Avenue, Brooklyn; afternoon.

42. (121) E. Vicinity of Jackson and Lorimer Streets,  
Brooklyn; evening.

43. (122) F. 715 Fifth Avenue, Brooklyn; afternoon.

  
Fred F. Dariow  
Special Attorney  
Department of Justice

IN THE MATTER OF THE APPLICATION  
OF THE UNITED STATES  
FOR AN ORDER AUTHORIZING THE  
UNITED STATES DEPARTMENT OF JUSTICE

AFFIDAVIT AND APPLICATION  
73-3-3

STATE OF NEW YORK  
COUNTY OF QUEENS  
EASTERN DISTRICT OF NEW YORK, ss:

Fred F. Barlow, being duly sworn, states:

1. He is an "investigative or law enforcement officer of the United States" within the meaning of 18 U.S.C. 2510(7), that is, he is an attorney authorized by law to prosecute or participate in the prosecution of offenses enumerated in Section 2516, United States Code, Title 18.

2. On April 12, 1973, the Hon. John R. Bartels, United States District Judge, Eastern District of New York, signed an Order authorizing the interception of oral communications at the Highway Lounge, 362 Metropolitan Avenue, Williamsburg, Brooklyn New York.

3. Communications intercepted pursuant to this Order ceased at about 5:30pm April 30, 1973. However, on the last day of interception, the transmission of communications was discontinuous, and the monitoring agents believe that because of this fact, and the length of time the monitoring devices were actuated during the period of Judge Bartels' Order, the power sources of the monitoring devices will not be capable of operating the devices unless replaced.

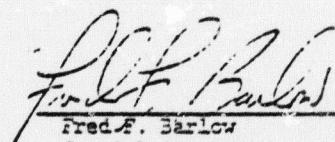
4. During the period of interception pursuant to Judge Bartels' Order, on April 25, 1973, James V. Napoli, Sr. was intercepted in a conversation with Anthony J. Abbatemarco, one of the subjects of interception of another order, signed by Judge Bartels on March 21, 1973 and extended on April 9, 1973 by Judge Bartels, concerning setting up a new operation in Queens and the Bronx, and setting the time and date for the final meeting at these subject premises, 3 pm, May 3, 1973.

5. The Application, Order and Affidavit for an extension of Judge Bartels' Order on April 12, 1973 have been reviewed by all necessary persons in the Department of Justice save the Attorney General, and, based on information received from his Executive Assistant's secretary at about 4:30 pm, May 2, 1973, affiant expects that the necessary authorization will be sent to the Eastern District of New York by noon,

11:30, 1973. However, if the monitoring agents' expectations that the monitoring devices will be inoperable unless replaced are correct, then the expected meeting will not be monitored or recorded.

6. Affiant avers on the basis of his participation in this investigation since February, 1972, and the information received from agents investigating the illegal activities of Abbatemarco, that the expected 3 pm, May 3, 1973 meeting is especially important to monitor and record, since it will provide valuable prosecutive evidence of not only both operations under investigation, but also evidence of their interrelationship, and new or proposed activities, unknown to the investigating agents until the conversation of April 25, 1973.

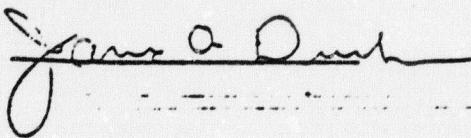
Wherefore, it is respectfully requested that this Court issue an Order authorizing agents of the Federal Bureau of Investigation to enter the premises of the Highway Lounge, 362 Metropolitan Avenue, Williamsburg, Brooklyn, New York, for the sole purpose of replacing the power sources of the monitoring devices and replacement of them within the area authorized for electronic surveillance by any Order signed by this Court continuing the authorized interception of oral communications at the subject premises.



---

Fred F. Barlow  
Special Attorney

Sworn to before me  
this 2<sup>nd</sup> day of  
May, 1973.





UNITED STATES DEPARTMENT OF JUSTICE

Address Reply to the  
Division Indicated  
and Refer to Initials and Number

WASHINGTON, D.C. 20530

Organized Crime Section  
Federal Building  
35 Tillary Street  
Room 327-A  
Brooklyn, New York 11201  
April 18, 1973

Honorable John R. Bartels  
United States District Judge  
Federal Courthouse  
225 Cadman Plaza East  
Brooklyn, New York 11201

Dear Judge Bartels:

Pursuant to your order of April 12, 1973, authorizing interception of oral communications, enclosed are copies of letters from the Federal Bureau of Investigation showing the progress of the interception.

Respectfully,

*Fred F. Barlow*  
Fred F. Barlow  
Special Attorney

Enclosures

P.S. These letters confirm my oral report to you at 9:30 AM, April 19, 1973.

PP.S. Also, enclosed are the original memorandum from the Attorney General and letter from the Assistant Attorney General.



In Reply, Please Refer to  
File No.

UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION  
201 East 69th Street  
New York, New York 10021

April 17, 1973

Mr. Denis E. Dillon  
Attorney in Charge  
Organized Crime Strike Force  
Eastern District of New York  
Cadman Plaza  
Brooklyn, New York

Attention: Special Attorney Fred F. Barlow

Re: Court Order of Judge Bartels, dated April 12, 1973

Dear Sir:

On April 16, 1973, monitoring of subject premises was conducted from approximately 1:00 PM to 6:35 PM. Due to technical problems and interference experienced, no audible conversations were intercepted. Attempts are continuing to resolve the technical problems with equipment being utilized in this installation.

Sincerely yours,

JOHN F. MALONE  
Assistant Director In Charge

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UNITED STATES DEPARTMENT OF JUSTICE

FEDERAL BUREAU OF INVESTIGATION

201 East 69th Street  
New York, New York 10021  
April 18, 1973

In Reply, Please Refer to  
File No.

Mr. Denis E. Dillon  
Attorney in Charge  
Organized Crime Strike Force  
Eastern District of New York  
Cadman Plaza  
Brooklyn, New York

Attention: Special Attorney Fred F. Barlow

Re: Court Order of Judge Bartels, dated April 12, 1973

Dear Sir:

On April 17, 1973, monitoring of subject premises was conducted from approximately 1:17 PM to 7:00 PM. Due to continued interference, many of the conversations were inaudible. Subject Napoli, Sr. and others were intercepted in a conversation in which a raid on a wire room and arrest of Allie Noce was discussed, very shortly after the arrest was made. The telephone number of the wire room, obtaining bail for Noce and other evidentiary matters were discussed.

Sincerely yours,

JOHN F. MALONE  
Assistant Director In Charge



In Reply, Please Refer to  
File No.

UNITED STATES DEPARTMENT OF JUSTICE  
FEDERAL BUREAU OF INVESTIGATION

201 East 69th Street  
New York, New York 10021  
April 19, 1973

Mr. Denis E. Dillon  
Attorney in Charge  
Organized Crime Strike Force  
Eastern District of New York  
Cadman Plaza  
Brooklyn, New York

Attention: Special Attorney Fred F. Barlow

Re: Court Order of Judge Bartels, dated April 12, 1973

Dear Sir:

On April 18, 1973, monitoring of subject premises was conducted from approximately 1:00 PM to 6:30 PM. During the course of the afternoon, in addition to subject Napoli, Sr., Richard Bascetta, Anthony Di Matteo, Arthur Cattenacci, James Napoli, Jr., Michael De Luca and Robert Voulo were observed at the Highway Lounge. Di Matteo was previously intercepted in numerous evidentiary conversations pursuant to court orders of Judge Weinstein and Judge Judd in a "policy bank". Voulo was intercepted in incriminating conversations pursuant to Judge Rosling's court order of February 20, 1973.

The most significant conversation intercepted was a "sit-down" lasting approximately forty-five minutes between Napoli, Sr., De Luca and Voulo. Voulo was questioned regarding not paying various employees on time and the name "Darry" (believed to be Dari Mascitti) was mentioned as well as the deceased Buddy Griffin. Concern was shown by De Luca for apparent ineptitude of Voulo in running his "leg" of the gambling operation since Buddy Griffin's death.

The conversation was replete with numerous references to large sums of money, including daily and weekly amounts. Voulo was given specific instructions as to new procedures to be followed in the future.

Technical problems are still being experienced but have improved somewhat. Vigorous efforts are being made to make the conversations more audible.

Sincerely yours,

JOHN F. MALONE  
Assistant Director in Charge

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ASSISTANT ATTORNEY GENERAL  
COMMERCIAL DIVISION

Department of Justice  
Washington 20530

APR 12 1973

Mr. Denis E. Dillon  
Attorney in Charge  
Brooklyn Strike Force  
Brooklyn, New York

Dear Mr. Dillon:

This is to advise you that pursuant to the power conferred on him by Section 2516 of Title 18, United States Code, the Attorney General has authorized an application to be made to a Federal judge of competent jurisdiction for an order under Section 2518 of Title 18, United States Code, authorizing the interception of oral communications for a fifteen (15) day period at the premises located at The Highway Lounge, 362 Metropolitan Avenue, Williamsburg, Brooklyn, New York, in connection with the investigation into possible violations of Title 18, United States Code, Sections 1955 and 371, by James Vincent Napoli, also known as Jimmy Napp; James Napoli, Jr., also known as Jimmy Jr. and Lefty; Martin Casella, also known as Motts; Anthony DiMatteo, also known as Tony Apples; Michael DeLuca, also known as Mikey Jr.; Richard Bascetta, also known as "Shotgun" and others as yet unknown. The memorandum of authorization approved by the Attorney General is attached hereto.

Accordingly, you or any other attorney on your staff who is an investigative or law enforcement officer of the United States within the meaning of Section 2510(7) of Title 18, United States Code, are authorized to make the above-described application.

Sincerely,

  
HENRY E. PETERSEN  
Assistant Attorney General

Enclosure

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5047  
UNITED STATES GO. OF JUSTICE

DEPARTMENT OF JUSTICE

Memorandum

DATE: APR 12 1973

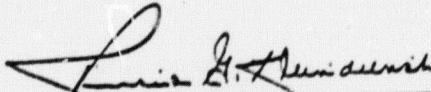
TO : Henry E. Petersen  
Assistant Attorney General  
Criminal Division

FROM : The Attorney General

SUBJECT: Authorization for Interception Order Application

This is with regard to your recommendation that I authorize an application to a Federal judge of competent jurisdiction for an order under Title 18, United States Code, Section 2518, authorizing the interception of oral communications for a fifteen (15) day period at the premises located at The Highway Lounge, 362 Metropolitan Avenue, Williamsburg, Brooklyn, New York, in connection with the investigation into possible violations of Title 18, United States Code, Sections 1955 and 371, by James Vincent Napoli, also known as Jimmy Napp; James Napoli, Jr., also known as Jimmy Jr. and Lefty; Martin Casella, also known as Motts; Anthony DiMatteo, also known as Tony Apples; Michael DeLuca, also known as Mikey Jr.; Richard Bascetta, also known as "Shotz 'n" and others as yet unknown.

Pursuant to the power conferred on me by Section 2516 of Title 18, United States Code, I hereby authorize the above-described application to be made by any investigative or law enforcement officer of the United States as defined in Section 2510(7) of Title 18, United States Code.

  
RICHARD G. KLEINDIENST

Attorney General

4/12/73

DATE

G. Exh. # 60



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Appendix has this day been mailed to counsel for appellants at the following addresses:

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DATED: May 6, 1976

# 76-1495

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

EUGENE SCAFIDI, BARRIO MASCITTI,  
ANTHONY DIMATTEO, SAVERIO ARRARA,  
MICHAEL DELUCA, JAMES NAPOLI, JR.,  
JAMES V. NAPOLI, SR., ROBERT VOULO,  
SABATO VIGORITO,

Docket No. 76-1495

Defendants-Appellants.

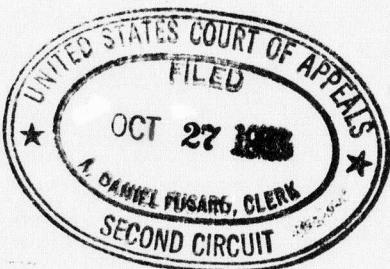
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\* PLEASE RETURN TO  
\* RECORDS ROOM  
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PETITION FOR REHEARING  
ON BEHALF OF BARRIO MASCITTI  
WITH SUGGESTION FOR REHEARING EN BANC

---

ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK



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B  
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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

EUGENE SCAFIDI, BARRIO MASCITTI,  
ANTHONY DIMATTEO, SAVERIO CARRARA,  
MICHAEL DELUCA, JAMES NAPOLI, JR.,  
JAMES V. NAPOLI, SR., ROBERT VOULO,  
and SABATO VIGORITO,

Defendants-Appellants.

Docket No. 76-1495

STATEMENT OF THE CASE

Appellant Mascitti appealed from a judgment of the United States District Court for the Eastern District of New York (Mishler, Ch.J.) convicting him and eight co-defendants of operating a gambling business in violation of state law (18 U.S.C. §1955). The principal proof of guilt against appellant Mascitti on the count of which he was eventually convicted was derived from conversations monitored in a private apartment (Apartment 309)\* and in a bar allegedly used by appellants as headquarters of a gambling operation (Hiway Lounge).

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PETITION FOR REHEARING  
ON BEHALF OF BARRIO MASCITTI  
WITH SUGGESTION FOR REHEARING EN BANC

---

ON APPEAL FROM A JUDGMENT  
OF THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

Appellant Barrio Mascitti respectfully seeks rehearing, with a suggestion for rehearing en banc, of the opinion and judgment of a panel of this Court (Moore, Smith, and Gurfein, C.J.J.) entered October 13, 1977, affirming his conviction for conducting illegal gambling businesses in violation of 18 U.S.C. §1955. The opinion is annexed hereto as Appendix A

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\*The indictment, as originally presented at trial, charged appellant Mascitti and 19 others with conspiring to conduct a gambling enterprise and three substantive counts. The conspiracy count was eventually dismissed. Appellant Mascitti was not charged in the first substantive count. The second substantive count (Apartment 309) charged him and others with operating a gambling business from December 1972 through March 1973, and was based upon evidence of conversations monitored at Apartment 309, 8-15 27th Avenue, in Queens. The third substantive count -- the "principal count" in this case and the count upon which almost all appellants were convicted -- charged a gambling business operating between March and May 1973, and was based primarily upon conversations monitored at the Hiway Lounge, the alleged headquarters of the gambling enterprise. While the court eventually dismissed the conviction against all the co-defendants on the second substantive count (Apartment 309), the conversations admitted into evidence as to that count played a crucial role in appellant Mascitti's conviction on the third count (Hiway Lounge), as they were used for voice identification, as "other crimes" evidence to prove Mascitti's intent, and as "background" evidence to prove the supposed relationship between the conspirators and the fact that the third count (Hiway Lounge) was but part of a long-standing business (see pp. 6028, 6097, 6106-6108, 6170-6172 of the trial transcript. Accordingly, the Apartment 309 surveillance was, and is, relevant for the petition.

On December 8, 1972, the first electronic surveillance order (309-I) was signed authorizing the interception of oral communications at Apartment 309, 8-15 27th Avenue. A second order (309-II) was signed several weeks later, and on February 20, 1973, a third order (309-III) was signed. As a result of the materials obtained by the Apartment 309 surveillance, the Government sought and received three authorizations (Hiway-I, Hiway-II, Hiway-III) to monitor conversations at the Hiway Lounge.\* (Appellants' Joint Appendix at A84-86).

Neither the original 309-I application nor any of the succeeding applications to intercept oral communications at Apartment 309 or the Hiway Lounge contained any statement that the manner of interception was going to be by a device physically required to be placed inside the apartment or lounge. The applications contain no request for authorization to enter the apartment or lounge to plant the devices, nor did any of the surveillance orders contain any authorization to trespass or to break and enter.

Testimony in the suppression hearing showed that the agents placed the monitoring devices in Apartment 309 -- a private apartment leased to one Phyllis Engert, a single woman -- during either the afternoon or evening of December 8, 1972 (H.72-73\*\*),

\*Conversations intercepted pursuant to the final order (Hiway-III), issued by Judge Neaher on May 24, 1973, were not introduced into evidence by the Government because of the long delay in sealing the tapes.

\*\*Numerals in parentheses preceded by "H" refer to pages of the transcript of the suppression hearing.

secretly entering the apartment by means of a passkey obtained from the building superintendent (H.326). During the pendency of the orders, the agents again entered surreptitiously to move the bugs (H.333). Although the agents were not certain of the precise number of entries that occurred, at least a third covert entry was undertaken to remove the electronic devices (H.332). The record does not indicate that the issuing judge was aware prior to the first entry, that covert entry would be attempted, and there is no evidence that any other judge was consulted prior to the other entries into Apartment 309.

Installation of the eavesdropping devices in the Hiway Lounge was accomplished by nighttime covert entry on April 17, 1973, without any specific judicial authorization, by means of a passkey (H.70). At the suppression hearing, the Assistant United States Attorney claimed that, prior to obtaining the Hiway-I order, he had informally alerted Judge Bartels of the Government's intent to enter the building surreptitiously. However, no testimony was taken at that time, and no specific order of authorization was issued (H.498-499). A second covert entry to move one of the microphones occurred during the pendency of the Hiway-I order; this time, no judge was made aware, even informally, of the proposed entry. Following expiration of the Hiway-I order, and before approval of the Hiway-II order, the Government sought and received an order signed on May 2, 1975, by Judge Judd, that permitted entry to rejuvenate the

batteries. Finally, at least one more covert entry occurred during the pendency of Hiway-II or Hiway-III (H.70-71).

In addition to the entries, the Government engaged in other conduct alleged by appellant Mascitti as evidence of insufficient compliance with Title III and the Constitution. Thus, there was a one-week delay in sealing the 309-III order.

In addition, there were persistent delays in the filing of court-ordered progress reports, or no filing at all.

On appeal to this Court, appellants argued that the entries not authorized by a separate order were illegal and that suppression was required by the Government's failure to supply progress reports or to seal the tapes in a timely manner. The panel disagreed, filing three separate opinions, one of which was a dissenting opinion by Judge Smith.

In the opinion of this Court, written by Judge Moore, the break-ins were supported since the orders "implied approval for secret entry." Appendix A at 6248. Relying on the lack of a specific "entry" requirement in Title III, and without further case citation, the decision concluded, necessarily, that such "implied" consent was tolerable under the Fourth Amendment, and expressed the opinion that judges were ill-equipped to determine the propriety of trespassory entries. Appendix A at 6249. The Court also found that subsequent entries resulted in "no greater incursion into the appellant's privacy," and therefore approved them. The Court also found no defect in the delay in sealing the 309 tapes or the failure to file progress reports. Finally,

the Court found, inter alia, that there was probable cause to issue the 309-I order.

In dissent, Judge Smith found that the surreptitious entries and other conduct "makes a mockery of the promise that the 'dirty business' of electronic eavesdropping authorized by the Act of 1968 ... would be strictly supervised and controlled." Stating that "it is not too much to ask that a magistrate pass upon the necessity for and the manner of surreptitious entries," Judge Smith noted that there are many means of monitoring conversations not so dangerous or intrusive as breaking and entering which should be passed on by a magistrate. Judge Smith concluded:

The lack of warrants for the entries is not the only defect in the procedures used here. The delays in sealing and lack of timely progress reports to the judges, as well as the unauthorized reentries indicate a wide disregard for the intent of the Congress that the use of this dangerous tool be strictly supervised. We have been willing to excuse an occasional slip-up on timing as my brothers have pointed out. The perhaps inevitable result has been a progressive weakening of the safeguards. I would agree with the District of Columbia Circuit in Ford and draw the line here.

Appendix A at 6260.

REASONS FOR GRANTING THE PETITION

Appellant Mascitti requests rehearing, and suggests rehearing en banc, because the decision of the panel that police officers may surreptitiously break and enter private premises to install listening devices without specific antecedent judicial authorization to do so, if not corrected, represents an extraordinary and dangerous assumption of power by police authorities. The importance of this issue was recognized by Judge Gurfein, and compelled his separate decision. It was noted as well by the Government, which characterized this issue as one of "utmost importance to the administration of Title III."\*

As noted by the panel, the decision of the majority places this Circuit necessarily in conflict with the District of Columbia Circuit's holding in United States v. Ford, 553 F.2d 146 (D.C. Cir. 1977). Moreover, the decision is also squarely in conflict with the recent decision of the Fourth Circuit in In the Matter of the Application of the United States for an Order Authorizing the Interception of Oral Communications, Docket No. 77-1238 (4th Cir., September 20, 1977),\*\* as well as implicitly contrary to the Eighth Circuit's decision in United States v. Agrusa, 541 F.2d 690 (8th Cir. 1976). We submit further that the panel decision is inconsistent as well with prior Supreme

\*See Government's motion for extension of time to file its brief on appeal, p.2, ¶17.

\*\*A copy of this opinion is annexed as Appendix B hereto.

Court decisions and with the decisions of this Court which have forcefully and repeatedly emphasized the careful limits and close judicial scrutiny which must be placed upon electronic surveillance. United States v. Marion, 535 F.2d 697, 699 (2d Cir. 1976); United States v. Gigante, 538 F.2d 502, 503 (2d Cir. 1976).

By a separate petition filed on behalf of appellant James V. Napoli, Sr., and other appellants in this case, rehearing has been sought on this issue. We join in the arguments set forth in that petition, and take this opportunity to add our own views. Moreover, we present an additional argument for rehearing: that the panel conclusion that there was probable cause to issue the first 309 order is incorrect, since there are no facts in the record to support that conclusion.

Point I

EXPRESS JUDICIAL AUTHORIZATION IS REQUIRED BEFORE POLICE AGENTS MAY SURREPTITIOUSLY ENTER PRIVATE PREMISES TO INSTALL, REPAIR, MOVE, OR REMOVE LISTENING DEVICES.

The panel holding that once police agents have obtained an order authorizing them to intercept conversations, they are thereby implicitly authorized, without any other judicial review, repeatedly to break and enter private premises is unsupportable as a matter of constitutional law and is contradicted by the record in this case.

1. Necessary to the panel's opinion is the conclusion that trespassory entries need not be specifically authorized

to be constitutional, and that, therefore, secretive physical trespass upon private premises is not a separate or greater intrusion, requiring separate judicial authorization, than the mere interception of conversations. The Supreme Court, however, has indicated that the law is quite the contrary. Well before the advent of notions of conversational privacy, the freedom from physical trespass was separately recognized as a cornerstone of the Fourth Amendment. Thus, Silverman v. United States, 365 U.S. 505 (1961), held that eavesdropping occurring by a trespassory invasion without a warrant was impermissible. In Silverman, the Court decided that it had

... never held that a federal officer may without warrant and without consent physically entrench into a man's office or home, there secretly observe or listen, and relate at the man's subsequent criminal trial.

Id., 365 U.S. at 512.

The principle that each physical entry be authorized was underlined by Osborn v. United States, 385 U.S. 323 (1966), in which, according to a later case, a warrant was adequate since it "authorized one limited intrusion." Berger v. New York, 388 U.S. 41, 57 (1967).

In no sense was this protection against repeated trespassory entries changed by Berger v. New York, supra, or Katz v. United States, 389 U.S. 347 (1967). In fact, in Berger, the issue was not presented, since each of the two surreptitious entries involved in that case was separately and spe-

cifically authorized. Instead, Berger concerned itself precisely with the overbreadth of a statute permitting without particularity general overhearing of conversations -- the second aspect of the search. Nor was there any intent in Katz, supra, to alter the rule requiring specific authorization for physical invasion of private premises -- rather, the reach of the Fourth Amendment was expanded to require authorization as well in situations including interceptions of conversations by means other than physical trespass. There is nothing in Katz to support the view that a warrant sufficient to permit interception of conversations is ipso facto sufficient, without specific authorization, to support physical trespass. The issues are simply not the same. In sum, in no sense has the Supreme Court adopted the position that surveillance accompanied by physical trespass upon private premises does not entail an invasion of privacy distinct from that which attends the overhearing of private conversations. See Application of the United States, supra; United States v. Ford, supra. The conclusion that the freedom from physical trespass is a separately protected constitutional interest is in accord with basic common sense. As the Fourth Circuit noted:

The distinction is obvious. Non-trespassory eavesdropping penetrates only that expectation of privacy which an individual reasonably possesses with respect to his spoken words. But when agents of the Government physically enter business premises, as to which an individual has a legitimate expectation of privacy, more than just his conversation is subjected to the Government's scrutiny. Intruding officers are capable

of touching items which would not be dislocated by the non-trespassory surveillance.

Appendix B at 17-18 (citations omitted).

2. The panel majority's position is even less defensible when it is remembered that the agents consistently re-entered the premises to move, rejuvenate, or remove the listening devices they had planted. The proposition that the abundance of surreptitious entries disclosed in this case implicated no significant privacy interest of appellant Mascitti is simply unreasonable as a matter of common sense. It is also contrary to the principles established in Osborn v. United States, supra, and Berger v. New York, supra, 388 U.S. at 57, that each intrusion into private premises be separately authorized.

3. Finally, as Judge Smith noted in his dissenting opinion, the legal questions here did not occur in a vacuum, but rather in the context of a pattern of casual and unsupervised electronic surveillance. No judge was informed prior to the Apartment 309 entry that surreptitious entry was planned, and while the judge knew the conversations to be monitored were to take place inside the apartment, given the existence of parabolic and spike microphones, it was not at all clear that the listening device itself had to be placed inside the apartment or, in any event, that a means like surreptitious entry (rather than the use of informants, for example) was required. The subsequent entry to move or remove the bugs at Apartment 309 were never shown to be necessary. Worse still, in addition

to being unauthorized, the entries may have been unrecorded, since the agent at the suppression hearing was unsure of the number of entries that had occurred. This pattern was repeated with respect to the Hiway Lounge. The Government, in addition to the invasions noted above, unduly delayed the sealing of the tapes and delayed or failed entirely to file court-ordered progress reports. As Judge Smith concluded in his dissent, such conduct indicates "a wide disregard for the intent of the Congress that the use of this dangerous tool be strictly supervised." Appendix A at 6260.

#### Point II

THE DECISION OF THE PANEL THAT THERE WAS PROBABLE CAUSE TO BELIEVE THAT APARTMENT 309 WAS THE SITUS OF GAMBLING IS BASED UPON A MISAPPREHENSION OF THE RECORD.

On appeal, appellant Mascitti argued that the application for the 309-I order failed to allege facts sufficient to conclude that Apartment 309 was the situs of illegal activity. The response of the majority of the panel was brief:

This claim is groundless. Physical surveillance of Apartment 309 had detailed the regular goings and comings of DiMatteo and Mascitti, and analysis of the apartment's trash had revealed betting slips and records.

Appendix A at 6250.

We respectfully submit that rehearing should be granted because the panel's reading of the record is incorrect. We are unable to find any evidence in the applications, in Judge Mishler's opinion below, or even a claim in the Government's

brief that there was any trash at all discovered at Apartment 309, let alone trash which showed that the apartment was being used for gambling.

The record does show that on one occasion, appellant Mascitti was observed depositing in a trashcan a bag which, when analyzed, was shown to contain gambling records. (Affidavit in support of application for 309-I, ¶¶9, 43, Appellants' Joint Appendix at A247, 261). However, the trashcan was not located at or near 8-15 27th Avenue, the building in which Apartment 309 was located, but near the Elks Head Bar in Brooklyn. Further, the discovery of the bag occurred on September 13, 1972, more than two months before appellant Mascitti or his co-appellant DiMatteo was ever seen in the vicinity of 8-15 27th Avenue, Queens (see Affidavit, ¶38, Appellants' Joint Appendix at A259). Contrary to the implication in the Court's opinion, then, the discovery of the "trash" had nothing to do with showing the use of Apartment 309 for gambling.

Moreover, we submit that the panel's observations concerning the "goings and comings" of appellants Mascitti and DiMatteo from the apartment significantly overstates the surveillance evidence. In fact, appellant Mascitti was seen entering Apartment 309 on but one or two occasions. The remaining times, surveillance evidence consisted of observations of appellant Mascitti in or near 8-15 27th Avenue, the building in which Apartment 309 is located, but which contains at least 100 other apartments (H.399).

In sum, we adhere to our view that the affidavit before the judge failed to show a nexus between the apartment and illegal gambling, and urge that rehearing be granted.

#### CONCLUSION

For the foregoing reasons, the petition for rehearing or rehearing en banc should be granted.

Respectfully submitted,

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DAVID J. GOTTLIEB,

Of Counsel.

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Nos. 909, 910, 911, 912,  
913, 914, 915, 916, 917—September Term, 1976.  
(Argued May 16, 1977      Decided October 13, 1977.)

Docket No. 76-1495

UNITED STATES OF AMERICA,  
*Appellee*,  
—against—

EUGENE SCAFIDI, BARIO MASCITTI, ANTHONY DiMATTEO,  
SAVERIO CARRARA, MICHAEL DeLUCA, JAMES NAPOLI, JR.,  
JAMES V. NAPOLI, SR., ROBERT VOULO and SABATO VIGORITO,

*Appellants.*

Before:

MOORE, SMITH and GURFEIN,  
*Circuit Judges.*

Appeal from judgments entered in the United States District Court for the Eastern District of New York before Honorable Jacob Mishler, *Chief Judge*, convicting appellants of conducting illegal gambling businesses in violation of 18 U.S.C. §1955.

All convictions affirmed.

FRED F. BARLOW, Special Attorney, Department of Justice, Brooklyn, New York; and

MICHAEL E. MOORE, Attorney, Department of Justice, Washington, D.C. (David G. Trager, United States Attorney for the Eastern District of New York; William G. Otis, Attorney, Department of Justice, of counsel), *for Appellee*.

ARNOLD E. WALLACH, Esq., New York, New York, *for Appellant Scafidi*.

DAVID J. GOTTLIEB, Esq., New York, New York (The Legal Aid Society, Federal Defender Services Unit, New York, N.Y., William J. Gallagher, of counsel), *for Appellant Mascitti*.

RICHARD W. HANNAH, Esq., Brooklyn, New York, *for Appellant DiMatteo*.

SAVATORE PIAZZA, Esq., Brooklyn, New York, *for Appellant Carrara*.

MAX WILD, Esq., New York, New York (Albert J. Brackley, Esq., on the Brief), *for Appellant DeLuca*.

THOMAS J. O'BRIEN, Esq., New York, New York, *for Appellant Napoli, Jr.*

MAX WILD, Esq., New York, New York (Rubin Baum Levin Constant & Friedman, of counsel), *for Appellant Napoli, Sr.*

DOMINICK L. DiCARLO, Esq., Brooklyn, New York (Donald E. Nawi, of counsel), *for Appellant Voulo*.

GUSTAVE H. NEWMAN, New York, New York, *for Appellant Vigorito*.

MOORE, Circuit Judge:

Nine defendants, Eugene Seafidi, Robert Voulo, James Napoli, Sr., James Napoli, Jr., Michael DeLuca, Sabato Vigorito, Saverio Carrara, Mario Mascitti, and Anthony DiMatteo appeal their convictions, after a jury trial before Chief Judge Mishler in the Eastern District of New York, for operating illegal gambling businesses in violation of 18 U.S.C. §1955.

The counts upon which the various defendants were convicted related to operations at different times and places. More specifically, twenty defendants were tried together on four counts of a seven-count indictment. Seafidi and Voulo were convicted on Count Two (the "967 East Second Street Count") of conducting an illegal gambling business from March, 1972 to July 1972. Appellants Napoli, Sr., Napoli, Jr., DeLuca, Vigorito, Carrara, Mascitti, and Di Matteo were convicted on Count Four (the "Hiway Lounge Count") of conducting an illegal gambling business from April, 1973 to June, 1973. Count Three (the "Apartment 309 Count") was dismissed after trial because the jury did not find five people involved in that gambling business, as required by §1955. Count Seven, the conspiracy count, was dismissed at the close of the Government's case because the indictment alleged a single conspiracy but the evidence showed at least two. Sentences for the defendants ranged from five years in prison and a \$20,000 fine (Napoli, Sr.) to two months in prison and 34 months probation (Seafidi).

I.

The evidence at trial showed a large-scale numbers lottery operating in Brooklyn during three discrete time periods: Spring, 1972 (the 967 East Second Street Count); Winter, 1972-73 (the Apartment 309 Count); and Spring, 1973 (the Hiway Lounge Count).

*The 967 East Second Street Count: Seafidi and Voulo.*

On May 1, 1972, FBI agents conducted a warrant-authorized search of a residence at the above address. They discovered Voulo and two others in the basement operating a policy "bank". They seized a great deal of betting parap<sup>h</sup>ilia, some of which contained Voulo's fingerprints.

Visual surveillance prior to the search had established that Voulo, Seafidi and others had been using the residence for more than one month. Apparently, Seafidi regularly picked up daily policy "ribbons" for delivery to the ring's "controllers" around the city.

Also, a warrant-authorized search of 405 Elder Lane in Brooklyn in June, 1971, had found Seafidi and Voulo standing at a table piled high with betting slips, adding machines and cash.

*The Apartment 309 Count: DiMatteo, Mascitti, Seafidi, Voulo, and Rocco Riccardi (all charged, but count dismissed after guilty verdicts were rendered only against the first four).*

The evidence on this count consisted primarily of tape recordings made pursuant to court-ordered electronic equipment (referred to herein as "bugs") placed at the apartment of a friend of Mascitti. The friend allowed Mascitti to use the apartment for a few hours each afternoon while she was absent. DiMatteo and Mascitti were shown to be "bank" workers who called Seafidi about gambling at least once each day. A court-ordered wiretap of Seafidi's home phone showed that he operated a lottery "accounting office". Because one defendant, Riccardi, was acquitted on this count, the Government failed to show the involvement of five people in the operation, as necessary under §1955. The count was thus dismissed.

Three court orders had authorized the bugs at Apartment 309: Orders 309-I, 309-II, and 309-III. 309-I was issued by Judge Orrin G. Judd on December 8, 1972, and authorized interceptions for 15 days. 309-II was issued by Judge Jack B. Weinstein on January 15, 1973, permitting interceptions for 15 days. 309-III was issued by Judge George Rosling on February 20, 1973, approving interceptions for 15 days at Apartment 309 and at Seafidi's residence in Queens. All the orders listed some of the defendants by name and included "others as yet unknown" as targets. The bugs at Apartment 309 were installed on the night of December 8, 1972, after the building superintendent gave the agents a key to gain entry. The agents re-entered the apartment once more during the surveillance to reposition one bug.

Because the Apartment 309 Count was ultimately dismissed, any investigatory errors of the police are relevant on appeal only to the extent that the evidence presented for this Count might have "spilled over" to affect other counts.

*The Hiway Lounge Count: The Napolis, DeLuca, Vigorito, Carrara, Mascitti, and DiMatteo.*

This was the principal count. Court-ordered bugs revealed that the Lounge was the headquarters for a massive numbers game. James Napoli, Sr. was the leader, with Napoli, Jr., Carrara, and Vigorito working as "controllers". DeLuca worked as an "accountant", and Mascitti and Di Matteo were "bankers".

The bugs at the Lounge had been installed pursuant to three court orders: Orders Hiway-I, Hiway-II and Hiway-III. Hiway-I was issued by Judge John R. Bartels on April 12, 1973, authorizing interceptions for 15 days excluding Sundays. The named targets were the Napolis,

DiMatteo, DeLuca, Martin Cassella and Richard Bascetta. Hiway-II was issued by Judge Bartels on May 3, 1973, i.e., three days after the end of Hiway-I, authorizing the bugs for 15 more days, excluding Sundays. The targets named were the Napolis, DeLuca, Voulo, several non-appellants, and "others as yet unknown". Hiway-III was issued on May 24, 1973, i.e., three days after the end of Hiway-II. The tapes obtained by Hiway-III were not sealed until more than three months later. No evidence from Hiway-III was introduced at trial.

The listening devices used in the Lounge were placed by FBI agents on the night of April 12-13, 1973. They were originally placed with one at the bar and one in a back room. During the pendency of Hiway-I the agents re-entered the Lounge to move the bar bug into the back room. During the three-day "pause" between Hiway-I and Hiway-II, Judge Judd issued an order authorizing the agents to enter the Lounge on the night of May 2-3 to restore the batteries in the bugs. At some point during Hiway-II and Hiway-III the agents re-entered to restore the batteries once again.

II.

The appellants raise many points of alleged error and each adopts the points argued by the others.

Besides the question of standing, namely, the right to question the legality of the surreptitious entries by agents to place the electronic devices which recorded the appellants' conversations, appellants' arguments focus primarily on various claims that the warrants pursuant to which the agents acted were for numerous reasons illegal and violative of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2510 *et seq.*

At the close of the Government's case, the conspiracy count was dismissed as to all appellants because of the dis-

crepancy between the single conspiracy alleged in the indictment and the evidence of multiple conspiracies shown at trial. The Court's dismissal of the conspiracy count gives rise to appellant's claim that reversible error resulted from the Court's refusal to grant a mistrial or to sever the trial as to the individual defendants. Their claim is that the spill-over effect of the evidence admitted pursuant to the conspiracy count was highly prejudicial and probably responsible for the respective convictions.

*Whether appellants have standing to object to the surreptitious entries of Apartment 309 and the Hiway Lounge.*

Appellants argue that the evidence derived from the bugs planted in Apartment 309 and the Hiway Lounge should be suppressed because of allegedly improper surreptitious entries made by the agents to place and recharge the bugging devices. The Government contends that none of the appellants has standing to question the entries into Apartment 309, and that only Napoli, Sr. has standing to object to the entries into the Lounge.

All of the appellants were in some way overheard on the bugs planted in Apartment 309 and/or the Lounge. Thus, they all claim that they have standing to object to any unauthorized entries because they are "aggrieved persons" within the meaning of 18 U.S.C. §2510(11). But that statute simply confers standing to object to unauthorized electronic surveillance; it does not expressly encompass standing to object to allegedly unauthorized entries to place or recharge the bugs. Only one present at the seizure or with a recognized "interest", either possessory or proprietary, in the premises, can claim the required "expectation of privacy" needed to object to such illegal entries. *See Alderman v. United States*, 394 U.S. 165 (1969) (proprietor can object to any unauthorized wiretap; those over-

heard can object only to their voice being overheard); and *Brown v. United States*, 411 U.S. 223 (1973) (those with no interest in storehouse cannot object to illegal search which uncovered stolen merchandise).

The elder Napoli was the manager of the Hiway Lounge, and as such can raise any issue of unauthorized entry. But none of the other appellants had any interest in the Lounge except for their presence there for a few hours each afternoon. Mascitti has an arguable claim to a proprietary interest in Apartment 309 because the true lessee, his friend, lent him the apartment's key so that he could enter on his own. But the district court found that his possession of the key and use of the premises for such a limited purpose was not enough to give him standing.

Whatever the exact, technical interests, or lack thereof, which these appellants had in the premises entered by the agents, it seems artificial to say that a person overheard, whose conversation would not have been overheard but for the entry, has no standing to move to suppress the conversations on a claim that the entry was improper. In any event, whether standing is accorded in this appeal to only one or any number of the appellants will not affect our holding that the Orders and the agents' activities were entirely proper. Therefore, for purposes of this appeal, we need not decide whether or not standing exists for the defendants to raise the claim of allegedly illegal entry.

*Whether a court order authorizing illegal entry for secret placement, repair and/or removal of bugs is required as a part of, or in addition to, the court order authorizing the use of bugs.*

Mascitti and his co-appellants claim that Title III of the Omnibus Crime Control Bill of 1968, 18 U.S.C. §2510 *et seq.*, prohibits all surreptitious police entries to install,

repair or remove court-authorized bugs. However, it is clear from the legislative history of the Bill as well as the language of the statute, that Congress intended to empower courts to permit such entries in proper cases and under proper procedures. *See United States v. Ford*, 414 F.Supp. 879, 883 (D. D.C. 1976), *aff'd* 553 F.2d 146 (D.C. Cir. 1977); S.Rep. No. 1097, 90th Cong., 2d Sess. 67, 103 (1968).

There remains the question of whether the authority granted by Title III is properly implemented where the court which approves the use of bugs does not explicitly authorize, either in the authorization order or in a separate order, secret break-ins to place, repair and/or remove the bugs. The Government argues that permission to make secret entries is at least implied in the bug authorizations here. Appellants argue, however, that all evidence gathered must be suppressed unless the court specifically authorizes secret entries.

The courts appear to be split on this issue, particularly after the recent District of Columbia Court of Appeals decision wherein it was held that the legislative purpose of Title III requires a separate court order for entry, *United States v. Ford*, 553 F.2d 146 (D.C. Cir. 1977). *See United States v. Altese*, No. 75 Cr. 341 (E.D.N.Y., Oct. 14, 1976) (separate order *not* required); *United States v. Dalia*, 426 F.Supp. 862, 865-66 (D.N.J. 1977) (separate order *not* required); *United States v. Finazzo*, 429 F.Supp. 803, 806-8 (E.D.Mich. 1977) (separate order required). It must be noted that until the District of Columbia Circuit spoke on this issue, it was generally considered proper practice *not* to require a separate warrant for entry.

The orders in our case, after a recital of facts charging that various appellants "have committed and are committing offenses involving the conducting, financing, managing, supervising, directing or owning in whole or in part

a gambling business" in violation of State and Federal law, authorized the agents to intercept oral communications of the appellants specified therein at the named premises. The orders further provided that

"this authorization to intercept oral communications shall be executed as soon as practicable after signing of this Order and shall be conducted in such a way as to minimize the interception of conversations not otherwise subject to interception. . . ." App. at A238, A276.

There can be no doubt that the warrants were based upon adequate factual affidavits. The alleged defect in the warrant is not the underlying factual basis therefor, but its lack of specific "breaking-in" authorization and a statement of the manner in which such "breaking-in" was to be conducted.

But the most reasonable interpretation of the orders in this case, granting authorization to bug private premises, is that they implied approval for secret entry. Indeed, any order approving electronic surveillance of conversations to be overheard at a particular private place, must, to be effective, carry its own authority to make such reasonable entry as may be necessary to effect the "seizure" of the conversations.

As Chief Judge Mishler stated below in his Memorandum Decision dated October 14, 1976,

"[I]t is this Court's position that once probable cause is shown to support the issuance of a court order authorizing electronic surveillance thereby sanctioning the serious intrusion caused by interception, there is implicit in the court's order, concomitant authorization for agents to covertly enter the premises and install the necessary equipment." App. at A133.

Once a judicial officer is convinced by the facts presented to him that electronic surveillance will aid in the detection of crime, his authorization that it be used should then transfer to the appropriate police agency the decision as to the precise mechanical means whereby the order is to be carried out. If the instrumentality to be used is a "bug", the placing of such a bug must of necessity be in the hands of the persons so authorized. And such placing will have to be surreptitious, for no self-respecting police officer would openly seek permission from the person to be surveilled to install a "bug" to intercept his conversations.

It would be highly naive to impute to a district judge a belief that the device required to effect his bugging authorization did not require installation. But neither should judges be presumed to have such familiarity with the installation of such devices or the premises in which they are to be installed that a court should be required in its order to specify the method of entry, the appropriate location of the bug, and the steps to insure its proper functioning. Were this to be required, a judge, in consultation with law enforcement officers, might have to visit the premises to be entered and discuss the best (or least objectionable) method of entry and the areas for the installations. His order would then have to contain explicit directions as to how to proceed, with the risk that any deviation therefrom, created by unforeseen emergencies, would create a possibility of illegality. It would be most unseemly for the courts to invade the province of law enforcement agencies by assuming that their competence was greater than that of the agencies presumably skilled in their field. It is significant that the statute, generally so detailed in its supervisory requirements, makes no mention of any need for a separate entry order. That the statute requires general supervision by the courts over

the bugging operation does not even impliedly impose on them the practical enforcement steps.

We, therefore, hold that when an order has been made upon adequate proof as to probable cause for the installation of a device in particular premises, a separate order authorizing entry for installation purposes is not required.

Nor do the subsequent entries for repair or battery recharging alter this result. These were not entries for any purpose other than that originally authorized. No greater incursion into the appellants' privacy occurred from the re-entries than resulted from the original entries. Furthermore, there is no suggestion that in any of the entries the FBI agents seized or attempted to seize or inspect papers or other articles not embraced in the order. They adhered to the authorized single purpose of seizing conversations represented in the papers on which the orders were granted as being of a criminal nature.

*Whether the Government violated various provisions of Title III.*

Mascitti contends that the affidavits underlying Order 309-I did not sufficiently demonstrate the need to bug the particular apartment. This claim is groundless. Physical surveillance of Apartment 309 had detailed the regular goings and comings of DiMatteo and Mascitti, and analysis of the apartment's trash had revealed betting slips and records.

Napoli, Sr. presents a similar insufficiency contention regarding the affidavit for interceptions at the Hiway Lounge. But the affidavit presented information gleaned from the bug of Apartment 309 as well as information gotten from confidential informants with established records of credibility. Also, physical surveillance identified the comings and goings of the principal suspects. The 25-

page affidavit of Special Agent Parsons reveals more than sufficient information to justify the issuance of the Hiway-I warrant. App. at A277-A302.

DiMatteo argues that the affidavit underlying the bugs at Apartment 309 did not sufficiently demonstrate what other investigative procedures had been tried without success. *See* 18 U.S.C. §2518(1)(e). But the affidavit adequately informs the judge of the "nature and progress of the investigation and of the difficulties inherent in the use of normal law enforcement methods", which is precisely what it has to do to satisfy the statute. *United States v. Hinton*, 543 F.2d 1002, 1011 (2d Cir. 1976), *cert. denied*, 97 S.Ct. 493, 796 (1977); *United States v. Fury*, 554 F.2d 522, 530 (2d Cir. 1977).

Mascitti, DiMatteo and Vigorito argue that the "delays" in sealing the tapes of conversations after the expiration of their authorizing orders require suppression of the tapes.

In *United States v. Fury, supra*, 554 F.2d at 539 33, we held that, where a single order was extended, the tapes did not have to be sealed until the end of the last extension. Where the intercept is of the same premises and involves substantially the same persons, an extension under these circumstances requires sealing only at the conclusion of the whole surveillance. *United States v. Principie*, 531 F.2d 1132, 1142 n.14 (2d Cir. 1976), *cert. denied*, 97 S.Ct. 1173 (1977). The foregoing applies to the short delays in sealing 309-I and 309-II as well as Hiway-I and Hiway-II, for once the later Orders are deemed extensions of the prior ones, the administrative delay in sealing—in only one instance more than seven days—is reasonable and fully understandable. Even if the later Orders are deemed separate events, the sealing delays are quite distinguishable from those in the case relied upon by the appellants, *United*

*States v. Gigante*, 538 F.2d 502 (2d Cir. 1976), where the unexcused delay was for over eight months.

The only tapes that were not sealed during the pendency of a subsequent extension order were those made pursuant to Order 309-II. These tapes were sealed after a delay of seven days caused primarily by the preoccupation of Special Attorney Barlow with preparations for the upcoming trial. Testimony presented to the trial judge made clear that the delay was not the result of any intent to evade statutory sealing requirements or to gain any tactical advantage. We agree with the trial judge that the Government has presented a satisfactory explanation for this short delay, fully in accord with the requirements of 18 U.S.C. §2518(8)(a). *United States v. Fury, supra*, 554 F.2d at 533.

Vigorito argues that the Government continued the Hiway-I and -II bugs beyond their 15-day expiration dates. But the authorizations for the bugs expressly excluded counting Sundays, so that all of the overheard conversations were within the authorized time periods.

Mascitti contends that the Government's failure to timely file "progress reports" to the authorizing judges requires suppression of the tapes gotten from the bugs. In several instances involving the 309 Orders, progress reports were filed up to two weeks late or not at all; with the Hiway Orders, one report was filed two days late. While these reports should have been timely filed, the sanction for failure to do so is surely not automatic suppression of the tapes. The requirement of reports, designed to enable the district judge to evaluate the continuing need for surveillance, is in the first instance discretionary with the judge authorizing the bugs. *See United States v. Iannelli*, 477 F.2d 999, 1002 (3rd Cir. 1973), *aff'd* 420 U.S. 770 (1975). So, surely, are any sanctions for failure to file timely. *See*

18 U.S.C. §2518(6). The judges here clearly did not abuse their discretion.

Carrara argues that the Government's failure to name him in the Hiway-II order requires suppression of his conversations gathered by that order. This argument is entirely refuted by *United States v. Donovan*, 429 U.S. 413 (1977). Napoli, Sr.'s similar claim is also refuted by *Donovan*.

DiMatteo argues that the misidentification of him as "Pasquale Rossetti" in Order 309-I requires suppression. This argument is frivolous in light of the complete absence of evidence that the Government was not acting in good faith. And the argument of DiMatteo based on failure to serve a timely inventory notice is foreclosed by *United States v. Donovan, supra*. See also *United States v. Variano*, 550 F.2d 1330, 1335-36 (2d Cir. 1977).

*Whether there was sufficient evidence to convict Scafidi and Carrara.*

Only Scafidi and Carrara question the sufficiency of the evidence against them.

Scafidi was observed regularly using 967 East Second Street. In fact, he arrived at the apartment once while the police were searching it. Prior to and subsequent to the use of the apartment, Scafidi had been involved with policy rings which used the same type of wagering records and the same runner identifications. Also, Scafidi's phone calls from his home, properly intercepted by wiretaps, convincingly proved his involvement with the venture.

Carrara was taped while in several incriminating conversations with Napoli, Sr. which strongly support the inference that Carrara was actively involved in the ring as one of its "controllers". The jury properly convicted him on this basis.

*Whether Count Four of the indictment (the Hiway Lounge Count) was legally sufficient.*

Napoli, Sr. contends that the Hiway Lounge count of the indictment was fatally defective for not specifying the type of gambling business he was alleged to have conducted. This argument holds no merit. The indictment tracked §1955 while specifying approximate dates and relevant New York statutes. This is sufficient under *United States v. Salazar*, 485 F.2d 1272, 1277 (2d Cir. 1973), cert. denied, 415 U.S. 985 (1974).

*Whether appellants were prejudiced by "spill over" from their joint trial.*

Most of the appellants (Napoli, Jr., Mascitti, Vigorito, Voulo, DeLuca, and Carrara) argue that once the trial court dismissed the conspiracy count at the end of the Government's case, the remaining substantive counts should have been severed for separate trials. The settled rule is that such a severance is not required unless prejudice would otherwise result or unless the conspiracy count had not been alleged in good faith. *United States v. Ong*, 541 F.2d 331, 337 (2d Cir. 1976), cert. denied, 429 U.S. 1075 (1977). There is no evidence here of bad faith on the part of the Government, and the conspiracy count was not frivolous; it was dismissed only for variance. The trial court gave the jury a lengthy cautionary instruction to disregard the conspiracy evidence and to judge each defendant on his own words and deeds. The jury showed its understanding of the instruction by acquitting several defendants. Moreover, the defendants convicted were found guilty on strong evidence, greatly reducing any risk of prejudice from joinder.

We have carefully considered all of the numerous issues raised by the appellants and find them to be without merit. The convictions are affirmed.

GURFEIN, *Circuit Judge*, concurring:

The dissenting opinion of my respected brother, J. Joseph Smith, and the split in the circuits, *see United States v. Ford*, 553 F.2d 146 (D.C. Cir. 1977), and *compare United States v. Agrius*, 541 F.2d 690 (8th Cir. 1976), impels me to add some of my own reasons for concurring in the majority opinion. Congress has constructed a statutory scheme for meeting the problems raised in *Berger v. New York*, 388 U.S. 41 (1967), and *Katz v. United States*, 389 U.S. 347 (1967), by enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 *et seq.* The issue is narrow. When a federal agent obtains access by trespass to premises in which he has been ordered to install a device to intercept oral communications by a court order which faithfully follows Title III and which includes a finding of probable cause, has he nevertheless intercepted conversations in a lawless manner as if he had no court order at all? Was there in fact "a neutral pre-determination of the scope of [the] search"? *Katz v. United States*, 389 U.S. at 358. Or are entries to plant "bugs" themselves unconstitutional invasions of privacy *distinct from* the actual eavesdrop sanctioned in the order? An affirmative answer was "[e]ssential to [the] holding" in *United States v. Ford*, *supra*, 553 F.2d at 170, on *constitutional* grounds. I respectfully disagree.

Title III covers oral interceptions ("bugging") without prescribing any duties for the judicial branch on the method to be used in installing the "bug". These statutory requirements were carefully tailored to meet the constitutional requirements set out in *Berger* and *Katz*. *See United States v. Tortorella*, 480 F.2d 764, 771-75 (2d Cir. 1973). Congress knew that whether a "bug" was put in place by trespass or otherwise, the use of a "bug" to intercept conversations would require a warrant except when the "bug" is carried

by a participant in a face-to-face conversation, *On Lee v. United States*, 343 U.S. 747 (1952), or is used with the consent of a party. *See Katz, supra*. The warrant under Title III is limited to interception of oral conversations, 18 U.S.C. § 2518, and does not in any way permit the search and seizure of goods or papers on the premises. Indeed, if such goods or papers were subjected to search under the interception order, suppression would follow. There is an analogy to the opening of foreign mail by the Customs, which is not constitutionally offensive provided the letters themselves are not read. *See United States v. Ramsey*, — U.S. —, 45 U.S.L.W. 4577 (June 6, 1977).

What the statute requires is not a specification by the judge of the method for placing the "bug" but simply "a particular description of the place where the communication is to be intercepted". Congress knew that an order such as is under review, that "electronic surveillance of the oral communications of the above-named subjects *shall occur* at the above described premises" (emphasis added), would require covert installation. If supporting proof were needed, it is supplied by the 1970 Amendment, Pub. L. No. 91-358, Title II, § 211(b), 84 Stat. 654 (amending 18 U.S.C. § 2518(4)), under which the order authorizing interception of an oral communication may direct a landlord or custodian, among others, to furnish the applicant with all facilities and technical assistance necessary to "accomplish the interception *unobtrusively*" (emphasis added). This provision is not for the protection of the subject of the interception order since it is to be incorporated only "upon request of the applicant". In sum, if the enforcement agent thinks that he can achieve such cooperation on his own, he need not get a court order to execute his mission "unobtrusively" with the cooperation of the landlord or custodian.

With its attention having been called to the need for doing the job "unobtrusively" to the point of enlisting the aid of persons whose aid would amount to trespass, Congress failed to include in Title III a provision such as is found in the New York Criminal Procedure Law § 700.20 (8) which requires that an eavesdropping warrant contain "[a]n express authorization to make secret entry upon a private place or premises to install an eavesdropping device if such entry is necessary to execute the warrant"—a provision added to the otherwise almost verbatim copying of 18 U.S.C. § 2518(4). The judge to whom an application is made may, of course, require more than the statute prescribes before he is willing to sign the order, but the requirement that he separately sanction each surreptitious entry is nowhere to be found in the statutory scheme. That can hardly be due to congressional oversight. It is implicit that ordinarily only a single entry need be made, save in the exigent circumstance of equipment malfunction, as was the case here. Because the statute does not require the judge to authorize the manner of entry, a contention that the judge is nevertheless required to do so must rest on a reading of the Fourth Amendment itself.

The Fourth Amendment in part reads: ". . . no warrants shall issue but upon probable cause supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized".

The orders here do conform precisely to the requirements of the Fourth Amendment as well as those of § 2518. They particularly describe the *premises* to be "searched." They state that there is probable cause to believe that particular oral conversations of *named* persons and others concerning the *specified* offenses will be obtained through the interception at the *named* premises which, there is probable cause to believe, are being used for commission of the *named* offenses. "Prompt" execution of the authoriza-

tion is ordered, and the interception is limited not only in time but to occasions when at least one of the named subjects is present.

Since the right of the named persons to privacy has already been subjected to the "probable cause" test at the hands of an independent judicial officer and since the order is detailed enough to defeat any realistic claim that it is a "general warrant," I believe that the basic requirements of the Fourth Amendment have been met. I respectfully suggest that cases which have held trespass to be invalid in the absence of *any* warrant whatever are hardly dispositive. *But cf.* the discussion in *United States v. Ford*, *supra*. In *Berger* there was a surreptitious entry but the Supreme Court failed to note it as a *separate* constitutional problem. *See* 388 U.S. at 45, 53-64, 81-82, 96-97, 107-12. We do have here "the procedure of antecedent justification . . . that is central to the Fourth Amendment." *See Osborn v. United States*, 385 U.S. 323, 330 (1966).

Judge Smith notes that there may be a danger in surreptitious entry. That may be conceded, but the federal judge is hardly in as good a position to evaluate such risks as is the law enforcement agent. Common sense will suggest that, in the absence of a plausible ruse, the "bug" should be put in place when the premises are vacant. A mistake as to whether they are occupied, in fact, could hardly be corrected by a judicial order.

Now that attention has been called to this question in several circuits, it is hoped that Congress will provide the national consensus needed to reconcile the needs of law enforcement with the rights of privacy that belong to all persons until probable cause has been shown and the approval of an independent judge obtained. The finding of what the judge must do in these circumstances to keep the "search" reasonable is, I think, within the prerogatives of Congress. In the meantime, until the Supreme Court

speaks, it might be advisable for district judges to make a general direction for forcible or surreptitious entry a part of the interception order, not so much on constitutional grounds, *see United States v. Agrusa*, 541 F.2d 690, 696-98 (8th Cir. 1976),<sup>1</sup> as for the protection of the agents.

SMITH, *Circuit Judge* (dissenting):

I respectfully dissent. I would reverse for retrial as to all defendants, with all evidence obtained by electronic surveillance after warrantless surreptitious entries suppressed. The course followed by the agents here makes a mockery of the promise that the "dirty business" of electronic eavesdropping authorized by the Act of 1968, 18 U.S.C. §§ 2510-2520 (1970), would be strictly supervised and controlled. Title III of the 1968 Crime Control Act was drafted with the *Berger* and *Katz* decisions as a guide, including the *Katz* requirement to "conduct the search within precise limits established by a specific court order. . . ." 1968 U.S. Code Cong. & Ad. News 2162, 2163. It is not too much to ask that a magistrate pass upon the necessity for and the manner of surreptitious entries into private premises, either business or residential, in light of the obvious dangers of injury and death to occupants and officers in the course of such gross invasions of privacy. The dangers may vary greatly between such methods as the planting of a bug by a restaurant patron, and a forcible breaking and entry when the premises are assumed

<sup>1</sup> The Eighth Circuit said: "[W]hile there are two aspects to the search and seizure which occurred here [interception of oral communications after forcible entry] as compared with one in *Osborn* and *Katz*, this difference is, for constitutional purposes, one of degree rather than kind." 541 F.2d at 698. In *Agrusa*, though the order permitted "forcible entry at any time of day or night", it was challenged unsuccessfully on Fourth Amendment grounds.

to be unoccupied. The Congress recognized the existence of such devices as the martini olive transmitter, the spike mike, the infinity transmitter and the microphone disguised as a wristwatch, picture frame, cuff link, tie clip, fountain pen, stapler or cigarette pack. 1968 U.S. Code Cong. & Ad. News 2183. Electronic devices in some instances might be installed in a manner not requiring entry by the officers into the premises. See *United States v. Ford*, 553 F.2d 146, 151 n. 20 (D.C. Cir. 1977); cf. the "spike mike" of *Silverman v. United States*, 365 U.S. 505 (1961). Because of its dangers, "bugging" as distinguished from wire-tapping, is relatively little used. See *United States v. Ford*, *supra*, 553 F.2d at 149, n. 12. The choice of methods should be made known to and passed on by the magistrate.

The lack of warrants for the entries is not the only defect in the procedures used here. The delays in sealing and lack of timely progress reports to the judges, as well as the unauthorized reentries indicate a wide disregard for the intent of the Congress that the use of this dangerous tool be strictly supervised. We have been willing to excuse an occasional slip-up on timing as my brothers have pointed out. The perhaps inevitable result has been a progressive weakening of the safeguards. I would agree with the District of Columbia Circuit in *Ford* and draw the line here.

PUBLISHED

United States Court of Appeals  
FOR THE FOURTH CIRCUIT

No. 77-1238

In the Matter of the Application  
of the United States for an  
Order Authorizing the Interception  
of Oral Communications.

UNITED STATES OF AMERICA,

Appellant,

Appeal from the United States District Court for the  
District of Maryland, at Baltimore. Frank A. Kaufman,  
District Judge.

No. 77-1284

In re:

UNITED STATES OF AMERICA,

Petitioner.

Upon Petition for a Writ of Mandamus. Frank A. Kaufman,  
District Judge.

Submitted July 21, 1977

Decided Sept. 20, 1977

Before WINTER and BUTZNER, Circuit Judges, and FIELD,  
Senior Circuit Judge.

(Jervis S. Finney, United States Attorney, and Daniel F.  
Goldstein, Assistant U. S. Attorney, for the Appellant;  
Stephen H. Sachs, James A. Rothschild and Robert B.  
Levin, for Appellee).

FIELD, Senior Circuit Judge:

Frustrated by their own inability to gather sufficient evidence to prosecute several individuals suspected of running a gambling operation in violation of Maryland law, local authorities requested the help of the FBI in late 1976. Until that time, the local probe had proceeded with the help of confidential informants, physical surveillance, a state court-approved wiretap and one instance of other electronic surveillance. It had reached an impasse, however, when the local agents failed in their attempts to intercept what were considered to be crucial conversations occurring within a commercial building where the principal suspects allegedly settled their accounts. The request for federal assistance was made in the hope that the FBI could succeed where the local authorities had failed. Cooperation was justified on the ground that the individuals under investigation were believed to be violating not only Md. Ann. Code art. 27, §§ 240 (illegal bookmaking) and 356 et seq. (illegal lottery), but also 18 U.S.C. §§ 1955 (illegal gambling business) and 371 (conspiracy).

2.

Upon entering the case, the FBI concluded (1) that the interception of oral communications within the commercial building was the only available method of investigation which had a reasonable likelihood of securing the evidence necessary to prove the violations of law, and (2) that the only feasible method of interception would entail surreptitious entry of the building to install,<sup>1</sup> maintain, and retrieve listening devices. It was proposed that three listening devices be placed on the premises, one in a private office and two in a part of the building open to the public. The latter two would be activated only when that part of the building was closed to the public and when it was verified that one or more of the target individuals were present.

On December 20, 1976, the Government applied to the United States District Court for the District of Maryland for an order under 18 U.S.C. § 2518 which would have expressly authorized both the interceptions and one

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1. The particular reasons advanced by the Government in support of these conclusions, as well as other specific facts pertinent to the case, are included in the district court record which is presently sealed.

3.

or more surreptitious entries at the commercial premises. An in camera hearing was held on the application the same day.

By memorandum and order dated December 30, 1976,<sup>2</sup> the district judge denied the order, although he found that the application met the formal and substantive requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510 et seq. Specifically, the district court agreed that the bugging of the commercial establishment was the only avenue then open to the Government if the investigation was to proceed,<sup>3</sup> and that this could only be accomplished by the use of surreptitious entry. Nonetheless, the court concluded

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2. In the Matter of the Application of the United States for an Order Authorizing the Interception of Oral Communications, Misc. No. K-1051 (D. Md., Dec. 30, 1976).

3. The court found that confidential informants were unwilling to testify; that some of the principal suspects avoided the telephone which local authorities had tapped; that a search for incriminating records would prove fruitless; that infiltration of the gambling operation would be impossible; and that physical surveillance would be of limited value.

that under the Fourth Amendment standard of "reasonableness," the Government was required to establish some "paramount" or "compelling" interest to justify judicial authorization of the surreptitious entry needed to install the bug, and that such a showing had not been made in this case.

Seeking reversal of the district court's decision, the Government petitioned this court to exercise its appellate jurisdiction under 18 U.S.C. § 3731 or 28 U.S.C. § 1291 (Case No. 77-1238) or, in the alternative, to direct a writ of mandamus to the district judge (Case No. 77-1284). Today we explain more fully our memorandum and order of July 26, 1977, in which, on an expedited basis, we denied the petition for a writ of mandamus in No. 77-1284, accepted appellate jurisdiction under 28 U.S.C. § 1291 in No. 77-1238, reversed the order of the district court, and remanded the case for further proceedings.

The circumstances and conditions under which law enforcement authorities may legally intercept the contents of private wire and oral communications are spelled out in detail by section 802, Title III, of the

Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. § 2510-2520. While the Act acknowledges the practical distinction between "wiretapping" and "bugging," see 18 U.S.C. §§ 2510 (1), (2), (4), it establishes the same scheme for the judicial authorization of either type of surveillance. Thus, our summary of that scheme with respect to wiretapping in United States v. Bobo, 477 F.2d 974, 980-982 (1973), cert. denied 421 U.S. 909 (1975), pertains similarly to the procedure which the Government and the district court were required to follow in this case.

- I -

Before proceeding to the substance of the Government's claims, we consider briefly the appellee's contention that we are without jurisdiction to review the lower court's denial of the application to intercept the target conversations.

First of all, we note that the Government does not advance 18 U.S.C. § 2518 (10)(b) as a basis for appeal. That section gives the Government the right to appeal

from an order granting a motion to suppress made under 18 U.S.C. § 2518 (10)(a), or the denial of an application for an order of approval for emergency electronic surveillance made pursuant to 18 U.S.C. § 2518 (7).<sup>4</sup> The Government points out, however, that section 2518 (10)(b) is not exclusive and by its terms the appeals authorized in the two specified circumstances are "[i]n addition to any other right to appeal \* \* \*." Accordingly, the Government contends that it has a right to appeal the district court's order under either 18 U.S.C. § 3731 or 28 U.S.C. § 1291.

We agree with counsel for the appellee that appellate jurisdiction of this case cannot be based upon 18 U.S.C. § 3731. That statute provides in pertinent part:

"An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding \* \* \*." (Emphasis supplied).

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4. See Application of United States, 427 F.2d 639, 641 (9 Cir. 1970).

In our opinion this case cannot be characterized as a criminal proceeding within the context of the statute since it has arisen prior to any indictment or even a grand jury proceeding. It involves only an investigatory proceeding through which, at best, the Government entertains the mere expectancy of obtaining evidence of crime. The Government has cited no authority directly supporting its position, and its tangential reliance upon Serfass v. United States, 420 U.S. 377 (1975), and United States v. Wilson, 420 U.S. 332 (1975), is wide of the mark. On this jurisdictional point we are inclined to agree with Professor Moore that "[i]n view of the familiar principal of strict construction of the Government's right of appeal in criminal cases, it would appear that an order refusing to authorize interception is not appealable." 9 Moore's Federal Practice, ¶110.10[7] at 232 (2d Ed. 1975).

We are of the opinion, however, that we have jurisdiction of the present case under 28 U.S.C. § 1291 since the district court's order was a "final decision" within the meaning of the statute. As we have pointed

out, the Government's application was not filed in a pending trial or criminal proceeding, but rather in an independent plenary proceeding pursuant to the statutory provisions of Title III, and the order of the district court denying the application was dispositive thereof and had the requisite finality to make it appealable under section 1291. See United States v. Wallace Co., 336 U.S. 793, 802 (1949), and United States v. Calandra, 455 F.2d 750, 752 (6 Cir. 1972).

At this juncture, decisions of the appealability of orders dealing with electronic surveillance under Title III are understandably sparse. The Ninth Circuit had occasion to consider the question in Application of the United States, 427 F.2d 639 (1970), and although the order in that case was somewhat ambiguous, the court of appeals concluded that since the trial court's denial of the Government's request "was truly dispositive of the Government's entire application," it was a final decision which was reviewable under section 1291. We agree with the decision in that case and accept it as supportive of our conclusion.

Counsel for the appellee suggest that the district court order is not final and appealable, contending that 15 U.S.C. § 2518 (1)(e) permits the Government to make successive applications to other judges of the district court in Maryland. Section 2518 (1)(e) provides in part as follows:

'(1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:

\* \* \* \* \*  
(e) a full and complete statement of the facts concerning all previous applications known to the individual authorizing and making the application, made to any judge for authorization to intercept, or for approval of interceptions of, wire or oral communications involving any of the same persons, facilities or places specified in the application, and the action taken by the judge on each such application; \* \* \*.'

The legislative history of Title III does not amplify the meaning of this statutory section, but in United States v. Bellosi, 501 F.2d 833, 836 (D.C. Cir. 1974), the court concluded that the legislative intent was "strictly to

limit the employment of those techniques of acquiring information \* \* \* to conform with the commands of the Fourth Amendment \* \* \*." In that case the court discerned a number of objectives that could be served by section 2518 (1)(e), among them being the prevention of judge-shopping; providing the judge to which application is made with detailed information appropriate to judicial consideration of whether the proposed intrusion on privacy is justified; and to reveal to the judge whether past applications have been denied in order to forestall Government harassment or other abuses of the statutory procedure. We accepted Bellosi's analysis of the statutory objectives in United States v. Bernstein, 509 F.2d 996 (4 Cir. 1975), vacated and remanded on other grounds, U. S. , 97 S.Ct. 1167 (1977), and in our opinion Congress never intended that section 2518 (1)(e) should be construed to require successive applications as a precondition to an appeal.

We turn now to the appellant's contention that the district court erred in holding that the Fourth Amendment required the Government to show a "paramount interest" as a condition to judicial approval of a surreptitious entry to install a listening device.

As an initial matter, we cannot accept the suggestion that we may elide the Fourth Amendment issue on the ground that the Government had no statutory power, with or without judicial permission, to secretly go on to private property for the purpose of planting bugs.

Nor, on the other hand, can the question be avoided under the theory that once the district court found the interception of the conversations to be allowable under Title III, the decision to secretly enter the premises became a subsidiary tactical matter committed solely to the judgment of the executing officers.

Admittedly, Title III is devoid of explicit language either authorizing or prohibiting surreptitious entries of private premises for the purpose of installing

or implementing approved electronic surveillance. The statutory section which delineates both the contents of the application and the contours of judicial action upon it, 28 U.S.C. § 2518 (1968), as amended 1970, is silent as to whether the Government is required to inform the authorizing court that such entries are planned and whether the court has the power to condone them. The appellant argues that a surreptitious entry is contemplated by that language in the statute which authorizes the court to order a landlord, custodian, or other person to furnish eavesdroppers with "information, facilities, and technical assistance to accomplish the interception unobtrusively \* \* \*," 18 U.S.C. § 2518 (4) (Emphasis supplied). The contention that this language, at least inferentially, supports the Government's position that Congress intended to approve covert entry as a permissible concomitant of judicially-sanctioned eavesdropping was recognized in United States v. Ford, 414 F.Supp. 879, 883 (D. D.C. 1976), aff'd 553 F.2d 146 (D.C. Cir. 1977). See also United States v. Altese, \_\_\_ F.Supp. \_\_\_, No. 75-CR-341, 50 (E.D. N.Y., filed October 14, 1976).

We find it unnecessary to rely solely on such tenuous inferences from the statutory language to conclude that covert entry by federal officials is congressionally authorized for, in our opinion, any other conclusion would run counter to the principle that we should attempt to effectuate the purpose of federal legislation and avoid interpretations which produce absurd or nugatory results.

Cf. Nardone v. United States, 308 U.S. 338, 341 (1939); Crosse & Blackwell Co. v. FTC, 262 F.2d 600, 605,606 (4 Cir.

1959). The purpose of Congress in enacting Title III was twofold: first, to safeguard the privacy of wire and oral communications by prohibiting their unauthorized interception, and, second, to combat certain enumerated crimes by allowing law enforcement personnel to conduct constitutionally inoffensive, yet effective, electronic surveillance. That the second of these goals was of paramount concern is indicated by the congressional finding that

"Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice." 82 Stat. 211, Section 801(c) 1968.

Moreover, the documented history of Title III is replete with references to the evils of organized crime and the pressing need to apprehend its perpetrators through the interception of their communications. S. REP. No. 1097, supra, reprinted at 1968 U.S. Code Cong. & Admin. News 2112, et seq. Indeed, at one point the Senate Committee on the Judiciary stated that "[t]he major purpose of Title III is to combat organized crime." Id. at 70; 2157.

We cannot accept the suggestion that Congress, so clearly desirous of arming federal investigators with the power to eavesdrop, intended, without saying so, to forbid the surreptitious placement of devices which might be vital to the effective exercise of that power. Were this true, criminals might avoid apprehension by conducting their conversations upon premises, such as those in the case at hand, which are insusceptible of eavesdropping by non-trespassory means. We discern no congressional intent to open such a loophole in Title III, especially in light of Congress' awareness of prior opinions of the Supreme Court which suggested not only the usefulness of surreptitious trespasses in this type

of investigation, but also the Constitutional permissibility of the secret, trespassory placement of listening devices under proper circumstances.<sup>5</sup>

In our opinion, the fact that Title III does not expressly limit the manner of installing listening devices is, in light of the announced legislative intent, consistent with the conclusion that Congress implicitly commended the question of surreptitious entry to the informed discretion of the district judge, subject to the commands of the Constitution. Thus, where the Government makes the showing required by section 2518, entitling it to an order authorizing the interception of oral communications, surreptitious entry for the purpose of implementing the interception is a statutorily viable

5. See S. REP., supra, 66-75, 1968 U.S. Code Corg. & Admin. News 2-53-2163, surveying all pre-Title III Supreme Court eavesdropping decisions, with special emphasis upon Berger v. New York, 388 U.S. 41 (1967). While the decision in Berger went off on other points, the opinion clearly reveals that the interception under scrutiny was accomplished by means of a bugging device surreptitiously planted in the target office. 388 U.S. 45, 81, 96, 102, 110, 111. The Court, however, did not order the suppression of the collected evidence on that basis.

technique. See United States v. Agrusa, 541 F.2d 690 (8 Cir. 1976), cert. denied, 429 U.S. 1045 (1977); United States v. Volpe, 430 F.Supp. 931 (D. Conn. 1977); United States v. Dalia, 426 F.Supp. 862 (D. N.J. 1977); United States v. Altese, supra; United States v. London, 424 F.Supp. 556 (D. Md. 1976), aff'd. on other grounds, 556 F.2d 709, sub nom United States v. Clerkley (4 Cir. 1977).

We do not mean to imply, however, that merely because Congress contemplated the use of surreptitious entries, a Title III order authorizing the interception of conversations gives eavesdroppers carte blanche to take any steps whatsoever to effect their plan. Secretive physical trespass upon private premises for the purpose of planting a bug entails an invasion of privacy of constitutional significance distinct from, though collateral to, that which attends the act of overhearing private conversations.<sup>6</sup> While we have held that judicially-

6. The distinction is obvious. Non-trespassory eavesdropping penetrates only that expectation of privacy which an individual reasonably possesses with respect to his spoken words. Cf. Katz v. United States, 389 U.S. 347 (1967). But when agents of the Government (Continued on page 18).

granted permission to invade an individual's expectation of conversational privacy, pursuant to Title III's guideline is constitutional, United States v. Bobo, 477 F.2d 974 (4 Cir. 1973), cert. denied 421 U.S. 909 (1975), such permission does not suspend the operation of the Fourth Amendment for other purposes. It cannot, in itself, excuse even less grievous governmental incursions into other aspects of private life. As the Supreme Court observed in Chimel v. California, 395 U.S. 752, 767, fn. 12

(1969):

" \* \* \* we can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require."

Permission to surreptitiously enter private premises cannot, therefore, be implied from a valid

(Footnote 6 continued from page 17)

physically enter business premises, as to which an individual has a legitimate expectation of privacy, G.M. Leasing Corp. v. United States, 429 U.S. 338, 352-354 (1977), more than just his conversation is subjected to the Government's scrutiny. Intruding officers are capable of seeing and touching items which would not be disclosed by the non-trespassory surveillance.

Title III order sanctioning only the interception of oral communications. See United States v. Ford, supra; United States v. Agrusa, supra at 696.<sup>7</sup> With respect to the instant case, this means that even had the district court issued an order of authorization on the basis of its preliminary conclusion that the statute permitted interception of the target conversations, the door would not have been automatically opened for the Government to plant listening devices in the manner proposed.

The district court was thus correct insofar as it subjected the request for authorization of surreptitious entry to separate Fourth Amendment consideration. Since in the absence of exigent circumstances the Fourth Amendment commands compliance with the warrant requirement, we would normally countenance secret entry

7. But see United States v. Dalia, supra; United States v. Altese, supra, and United States v. London, supra, taking the position that authorization of covert entry to install bugging equipment is implicit in an order sanctioning only interception.

by federal agents for the purpose of installing, maintaining, or removing listening devices only under the following conditions: (1) where, as here, the district judge to whom the interception application is made is apprized of the planned entry; (2) the judge finds, as he did here, that the use of the device and the surreptitious entry incident to its installation and use provide the only effective means available to the Government to conduct its investigation; and (3) only where the judge specifically sanctions such an entry in a manner that does not offend the substantive commands of the Fourth Amendment. Such a requirement is not novel to the law of search and seizure. It also comports with the interception scheme of Title III, since it is apparent that the legislature anticipated meticulous judicial supervision of all aspects of electronic eavesdropping.

While the district judge correctly bifurcated his consideration of the applications for permission to eavesdrop and to enter, we are of the opinion that he erroneously denied the requested order on the basis that the Fourth Amendment required the Government to show, in addition to "the obviously important interest" it had already established, a "paramount" or "compelling" justification for the secret entry. The difficulty this standard presents is not only that it is foreign to settled Fourth Amendment doctrine, but also that it, in effect, operates to usurp the legislative function. As we have had occasion to observe in another eavesdropping context,

"Men may differ, and many courts have differed, as to what is a reasonable search and seizure, but it is beyond question that the Fourth Amendment only prohibits unreasonable searches and seizures." United States v. Bobo, 477 F.2d 974, 978 (1973) (Emphasis supplied).

While the precise contours of the test of reasonableness vary from case to case, it is clear that the test is designed

"\* \* \* to guarantee that a decision to search private property is justified by a reasonable governmental interest. If a valid public interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." Camara v. Municipal Court, 387 U.S. 523, 539 (1967).

Significantly, the test "is not inflexible or obtusely unyielding to the legitimate needs of law enforcement \* \* \*;" and there is room in the Fourth Amendment to accommodate both the legitimate goals of law enforcement and the individual's right of privacy in the area of electronic surveillance. United States v. Bobo, supra, 477 F.2d at 979.

The test advanced by the lower court would permit the judiciary to substitute its judgment for that of the legislature as to the nature and significance of the public interest which justifies electronic surveillance. In Title III Congress specified the criminal laws which federal authorities are authorized to investigate by the interception of communications. 18 U.S.C. § 2516 (1), as amended 1971. The statute contains no indication that the enforcement of any one of

these specified laws is more or less in the public interest than the similar enforcement of the others. Yet, the "paramount interest" standard adopted by the district court would ignore the statutory equation of the importance of eavesdropping to the enforcement of the enumerated laws. Under such a rationale, an investigation of a violation of the gambling laws, although authorized by section 2516, would apparently never satisfy the paramountcy requirement if conducted by means of eavesdropping devices secretly planted -- even when the apprehension of an offender, as here, could not be accomplished by other means. On the other hand, the use of secretly planted devices to prevent the imminent bombing of an office building, likewise authorized by section 2516, would evidently square with this application of the Fourth Amendment to the statutory procedure.

We cannot approve a standard which differentiates between the interests which Congress has placed on an equal basis, for the courts are not free to pick and choose in this fashion between congressional responses to national problems. Cf. Nebbia v. New York, 291 U.S.

502 (1934). The decision in Burger, supra, and the findings embodied in section 801 of Title III demonstrate that Congress had the power to authorize surveillance to combat the specified crimes and that it exercised that power reasonably. This being established, we would usurp the legislative function if we were to question, as the paramountcy standard apparently does, the wisdom or appropriateness of the congressional decision to place equal emphasis upon the electronic investigation of all the section 2516 crimes.

We decline, therefore, to deviate from the settled Fourth Amendment test of reasonableness. Applying that test, we conclude that the district court should have granted the Government's request for an order sanctioning both the interception of the oral communications and the surreptitious entry into the commercial building for the purpose of installing, maintaining, and removing the bugs. The reasonableness of the proposed interception is implicit in the observation of the court below that "[i]f the Government had \* \* \* sought only authorization to install a telephone wiretap, this Court would

have granted the same." Title III makes no distinction between the requisites of valid wiretapping and bugging applications, and, when authorized pursuant to Title III, neither type of surveillance violates the Fourth Amendment. United States v. Bobo, supra.

With respect to the proposed entry, we are convinced that the manner in which the Government proposes to plant the devices reasonably accommodates both the public interest in criminal investigation and the interests of those individuals who might entertain justifiable expectations that their premises will not be physically invaded by outsiders. The public interest is demonstrated by the finding of the district court that the investigation could proceed only by the surreptitious installation of the device. The willingness of the Government to abide by detailed guidelines as to the time and manner of entry, its assurance that entry will be made only at a time when the premises are unoccupied, and its acknowledgment that the scope of any such entry should not exceed its limited purpose, impresses us as evincing a proper respect for those

aspects of privacy which are unrelated to the precise purpose of the statutory mission.

- IV -

We confirm our order of July 26, 1977, in the following respects:

The petition for a writ of mandamus (No. 77-1284) is denied. The order of the district court in No. 77-1238 is reversed and the case is remanded to the district court for further proceedings. On remand, the district court shall, upon a showing by the government that the factual basis for its request for its order to install three devices for the interception of oral communications at the locality and upon the terms and conditions set forth in its application, including the right to make surreptitious entry to install, maintain and remove the same, is now substantially the same as that demonstrated at the time of the application, issue the requested order.

REVERSED and REMANDED.

CERTIFICATE OF SERVICE

October 27, 1977

I certify that a copy of this petition for rehearing has been mailed to Michael E. ~~MOORE~~, Esq., U.S. Department of Justice, Washington, D.C., and to counsel for the other appellants.

